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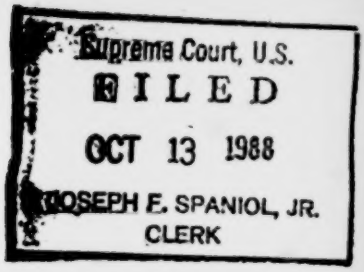

IN THE SUPREME COURT OF THE UNITED STATES
OF AMERICA

No._____

_____ TERM

JERRY H. SUMMERS,

Appellant

vs.

MAYOR ROBERT L. THOMPSON, COMMISSIONERS JAMES ABLES, DON GENTRY, BRYSON JOHNSON, and JIMMY WILLIAMSON, a/k/a THE CITY COMMISSION OF SODDY-DAISY, TENNESSEE, in their capacities as Commissioners of the City of Soddy-Daisy, Tennessee; ROBERT ECKARD, in his capacity as Police Chief of Soddy-Daisy, Tennessee; THE CITY OF SODDY-DAISY, TENNESSEE, A municipality and MICHAEL CODY, Attorney General of the State of Tennessee,

Appellees

ON APPEAL FROM THE
SUPREME COURT OF TENNESSEE

ENTRY OF APPEARANCE AND JURISDICTIONAL STATEMENT

Jerry H. Summers
Thomas J. Wright

Summers, McCrea & Wyatt, P.C.
500 Lindsay Street
Chattanooga, TN 37402
615/265-2385

QUESTIONS PRESENTED

1. Whether Tennessee's statutory scheme which provides for the "at will" termination by the governing body of the municipality, of a municipal judge imbued with jurisdiction to impose fines of up to $50.00 and incarcerate for terms of up to ninety (90) days violates the doctrine of Separation of Powers contained in Article III, Section 1 of the United States Constitution.

2. Whether the doctrine of Separation of Powers contained in Article III, Section 1 of the United States Constitution is applicable to the States through the Due Process and Equal Protection clauses of the Fifth and Fourteenth Amendments to the United States Constitution and therefore **Dreyer vs. Illinois,** 187 U.S. 71 (1902) should be overruled.

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JURISDICTIONAL STATEMENT

Pursuant to Rules 12.3 and 15 of the Rules of Supreme Court of the United States, Appellant, Jerry H. Summers, files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the Final Decree entered by the Supreme Court of the State of Tennessee in this case and should exercise such jurisdiction herein.

OPINIONS BELOW

1. **Jerry H. Summers vs. Mayor Robert L. Thompson, et. al.,** No. 63664 (Hamilton County, Tennessee Chancery, March 6, 1987 (Memorandum Opinion).

2. **Jerry H. Summers vs. Mayor Robert L. Thompson, et. al.,** S/C No. 229 (Tenn. May 23, 1988) (Slip Opinion awaiting publication).

3. **Jerry H. Summers vs. Mayor Robert L. Thompson, et. al.,** S/C No. 229 (Tenn. July 18, 1988) (Order denying petition for rehearing).

STATEMENT OF THE GROUNDS FOR JURISDICTION

This is an appeal from a decision of the Supreme Court of the State of Tennessee which upheld the validity of a State statutory scheme in the face of Appellant's Constitutional challenge. The judgment for which Appellant seeks review was entered May 23, 1988. That decision reversed the Memorandum Opinion of the Chancery Court of Hamilton County, Tennessee and dismissed Appellant's petition for writ of certiorari, which petition initiated this proceeding in the Chancery Court. Appellant petitioned for a rehearing before the Tennessee Supreme Court and an Order denying such petition was entered July 18, 1988.

On August 17, 1988 Appellant's Notice of Appeal to the Supreme Court of the United States was filed with the Chancery Court of Hamilton County, Tennessee as well as with the Supreme Court of Tennessee on August 17, 1988.

Jurisdiction in this case is predicated upon 28 U.S.C. § 1257 (2) in that the highest Court of the State of Tennessee has upheld the validity of a State statute in the face of a Constitutional challenge.

CONSTITUTIONAL PROVISIONS INVOLVED

(1) Article III, Section 1 of the United States Constitition:

"The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, shall, at stated times, receive for their services, a compensation, which shall not be diminished during the continuance in office.

(2) Fifth Amendment to the United States Constitution:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service and time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(3) Fourteenth Amendment to the United States Constitution, Section One:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Jerry H. Summers served as the City Judge of the City Court of Soddy-Daisy, Tennessee continuously from its creation in 1971 when the City of Soddy-Daisy was incorporated. Mr. Summers was appointed by the Board of Commissioners of the City of Soddy-

Daisy. On September 24, 1985 Mr. Summers was telephoned by Soddy-Daisy Mayor Robert L. Thompson and informed that he was being terminated as City Judge of Soddy-Daisy by unanimous vote of the Board of Commissioners. The termination was made official at an October 3, 1985 regular meeting of the Commission.

Prior to his termination, Mr. Summers had received pressure from at least certain Commission members to increase the amount of revenue generated for the City by its Court.

On November 27, 1985 Mr. Summers filled a Petition for Writ of Certiorari in the Hamilton County Chancery Court attacking his dismissal as City Judge and seeking reinstatement to such position. In this Petition Mr. Summers alleged, among other things, that the State statute providing that the City Judge served at the will of the Board of Commissioners was unconstitutional in that it violated the doctrine of Separation of Powers contained in Article III, § 1 of the United States Constitution as well as Article II, § § 1 and 2 of the Tennessee Constitution, the due process provisions of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 8 of the Tennessee Constitution. The unconstitutionality of the State statutory scheme under the Federal Constitution was urged throughout these proceedings.

After briefing on the issues presented, the Hamilton County Chancery Court, Chancellor R. Vann Owens presiding, issued a Memorandum Opinion holding that all provisions of the law which purport to allow the removal of a City Judge at the will of the City Commission are unconstitutional under Article II, § § 1 and 2 of the Tennessee Constitution. The Chancellor did not address the Federal Separation of Powers issue.

The Chancellor's decision was appealed directly to the Tennessee Supreme Court since the sole determinative question was the constitutionality of a State statute. Although briefing was primarily directed to the issue of whether the statutory provisions in question violated the Separation of Powers provisions of the Tennessee constitution, Appellant herein continued to assert the unconstitutionality of the statutory scheme under the Federal Constitution as well.

On May 23, 1988, the Tennessee Supreme Court issued its Opinion and Decree. The Tennessee Supreme Court declined to

reach even the State constitutional argument, holding that when properly construed, the statutory provisions authorizing the City Court over which Mr. Summers presided, provided such limited jurisdiction that such city judges were not actually vested with State judicial power.

Thereafter, Mr. Summers filed a Petition to Rehear before the Tennessee Supreme Court. In the Petition to Rehear Appellant herein again raised the issue of the constitutionality of the State statutory scheme, as it was interpreted by the Tennessee Supreme Court, under the Separation of Powers provisions found in both the State and Federal Constitutions. By Order filed July 18, 1988 the Petition to Rehear was overruled and this Appeal ensued. Notice of Appeal to the Supreme Court of the United States was filed August 17, 1988.

REASONS FOR PLENARY CONSIDERATION

Plenary consideration, with briefs on the merits and oral argument, should be given to the issues presented in this Appeal because they involve the most fundamental rights of the citizens of this country and the most fundamental constitutional limitations on the exercise of governmental power by the State. On one hand are the rights of the individual to due process of law prior to deprivation of liberty or property. Under the statutory provisions for appointment of a City Judge, as interpreted by the Tennessee Supreme Court, the City Judge of Soddy-Daisy has the power to incarcerate for terms of up to ninety (90) days. It is frightening to consider the prospects of such power without the safeguards inherent in a free and independent judiciary. Appellant asserts that these safeguards are inherent under the due process and equal protection provisions of the Fifth and Fourteenth Amendments to the United States Constitution.

To protect against this danger, the framers of our constitution provided for a separation of the powers of government. Appellant is aware of no re-examination of the applicability of this great doctrine to the States since the 1902 decision in **Dreyer vs. Illinois,** 187 U.S. 71 (1902). Since that time, a number of fundamental constitutional rights have been applied to the States through the Fifth and Fourteenth Amendments. It is essential that the rights of the in-

dividual be protected by the application of the Federal Separation of Powers doctrine to the States as well.

For these reasons, Appellant urges plenary consideration of the issues raised in this Appeal.

Respectfully submitted,
SUMMERS, McCREA & WYATT, P.C.

By: /s/ Jerry H. Summers
Thomas J. Wright
500 Lindsay Street
Chattanooga, TN 37402
615/265-2385

APPENDIX

1. Petition for Writ of Certiorari filed with the Chancery Court of Hamilton County with Exhibits and Amendments.

2. Transcript of proceedings of Soddy-Daisy City Commission Meeting October 3, 1985.

3. Memorandum Opinion of Hamilton County Chancery Court entered March 6, 1987.

4. Opinion of Tennessee Supreme Court filed May 23, 1988, with Concurring Opinion.

5. Decree of Tennessee Supreme Court filed May 23, 1988.

6. Order of Tennessee Supreme Court denying Petition for Rehearing filed July 18, 1988.

7. Notice of Appeal to United State Supreme Court filed August 17, 1988.

IN THE CHANCERY COURT OF HAMILTON COUNTY, TENNESSEE

JERRY H. SUMMERS,

Plaintiff

No. 63664

-vs-

Part 2

MAYOR ROBERT L. THOMPSON, et. al.

Defendants

TRANSCRIPT OF MEETING OF SODDY DAISY CITY COMMISSION

OCTOBER 3, 1985

By agreement of the parties, the initial parts of the meeting of the Commission on October 3, 1985, have been deleted from this transcript. This transcript begins at the point at which Mr. Paul Page, City Manager for the City of Soddy Daisy is making his report to the Commission.

Mr. Page: The other thing is that the Commission had asked that I contact several people which I have contacted as an alternate or a judge pro tem. Those people, the three people are David Norton, Bill Hall and Ray Dodson have been contacted and all three agree to serve as judge pro tem at the wish of this Commission. I have nothing else to say.

Mayor Thompson: OK. Thank you. The other Commissioners, Vice Mayor Ables?

Vice Mayor Ables: No, thank you.

Mayor Thompson: Mr. Johnson?

Mr. Johnson: No Sir.

Mayor Thompson: Mr. Gentry?

Mr. Gentry: No Sir.

Mayor Thompson: I make a motion to change the City Judge effective immediately and we direct the City Manager to place an advertisement in the newspaper for applicants for City Judge of Soddy Daisy and David Norton will serve as judge pro tem while we are in the process of interviewing and selecting a new City Judge.

Comm. Gentry: I'll second the motion.

Mayor Thompson: Any discussion?

Mayor Thompson: OK, the roll will be called.

Recorder: Vice Mayor Ables?

Ables: Yes

Recorder: Commissioner Gentry?

Gentry: Yes

Recorder: Commissioner Johnson?

Johnson: Yes

Recorder: Mayor Thompson?

Thomspon: Yes

Thompson: We need to adjourn for the Beer Board meeting, do I hear a motion to adjourn.

Joe Shadwick: Before we do that Mr. Mayor, may I speak to this last motion here?

Thompson: Yes sir.

Joe Shadwick: I am Joe Shadwick and I live at 124 Shearer Street. I don't know what our problem is and don't pretend to if there is a problem. I have lived in Soddy Daisy all my life and set on that Board right there for 8 years. I have known Judge Summers for more than 8 years. His court has been held in integrity and he is a man of distinction. A number of years ago and you remember this yourself, I had a seriously ill son that we like to have lost and we were taking him directly to Erlanger Hospital one afternoon and I was chased through Red Bank and we had called Red Bank and told them we were coming through there on our way to Erlanger

Hospital with Mike. A Red Bank police car pulled out from the Red Bank City Hall, I thought the man was going to help me get to Erlanger Hospital with my son, instead of that the man tried to stop me. He already knew I was coming and he pulled up beside me and told me to pull over or he was going to give me a ticket. I told him I wasn't stopping and was on my way to Erlanger Hospital and if he wanted to give me a ticket to meet me there and I would be there in a few minutes. Later he did come on to Erlanger Hospital and I was issued a traffic citation in the Emergency Room at Erlanger Hospital. My son was placed in Intensive Care and I was ordered to appear in Red Bank City Court at 8:30 the next morning and I was tried and fined $50.00 and costs and I refused to pay it and was placed under bond. Later I was tried in Criminal Court in Chattanooga. In each trial the policeman involved in that swore under oath that he clocked me through the intersection at Signal Mountain Road and Dayton Blvd. at 115 miles an hour on Friday afternoon at 5:00 in heavy traffic. Now you be the judge of that yourself. The Judge in the City Court declared me not guilty and I had planned on carrying it further if I had been declared guilty there. I think we have an excellent judge up here. I have watched him for more than 8 years. If there is a problem then I think the citizens of Soddy Daisy should know about it. This is a court of integrity and it isn't kangeroo court and you come in here you have fair judges. I appreciate your time.

Thompson: Thank you Mr. Shadwick.

Vice-Mayor Ables: I move we adjourn.

Man 2: I think was Joe was asking a question that all of us would like to hear some comment from y'all or if you think it is unanimous that you are dismissing a judge. We would like to know what the problem is with the Judges we have and we would like to know why you go and change it.

Thompson: Our attorney has advised us not to response to that question at this time.

Man 3: Has she has advised you not to vote on it at this time.

Thompson: No sir.

Man 3: Well she should. That's why you want to get rid of him.

Thompson: The vote has already been taken.

Man 3: Had the vote already been taken prior to this meeting?

Thompson: No sir.

Man 3: When did you take it?

Thompson: We just now took it.

Man 3: Who took it?

Thompson: I beg your pardon?

Man 3: You haven't called the roll yet.

Recorder: I did.

Thomspon: Yes, roll was called. It was 4-0.

Man 4: But they can't give the citizens of this community a reason why that they are firing a man that has been there this long.

Thompson: Our attorney has asked us not to respond to that question at this time.

JES: I would like to explain as best as I can. It is important to note what is in the City Charter of the City of Soddy Daisy and that is that on page 67 subsection D 3 that the Board of Commissioners has the responsibility of appointing a city judge who will be an attorney at law in private practice in the courts of this state and who shall serve at the will of the Board. The important language there is

that he shall or she shall serve at the will of the Board. It is important to remember at this time the Commissioners do not have to give a reason for terminating an at will employee. Just as though they wanted to... well I don't work for the Board, I work for the City Manager. If he wanted to say tonight, well its been nice knowing you but your gone. He would not have to give me a reason. And that is very important under the law. He is an at will employee of this Board. This Board at my understanding does not desire at this time to give a reason.

Man: You know some of us in this group voted for you folks and we voted that we had enough trust in you that we elected you to represent us. I feel like each one of you and I know the votes have been taken and its 4 to 0, but I feel like...

TAPE WAS BLANK AT THIS POINT.

Man 1: Mayor?

Mayor: Yes Sir.

Man 1: I am sure that this change being made will give the citizens of Soddy Daisy something better. Would you mind explaining what we can expect...

Mayor: We are going to have a time for persons interviewing for this job at this time and I don't know who it will be...

Man 1: I mean you all evidently have something better in mind. Do you not? Or is this just a dismissal...for the sake of dismissal.

Mayor: We have been advised not to response to that question at this time.

Man 1: Well I know, but do you have something better at this time? Would you mind... I know you have been advised not to tell the future plans...

Mayor: I said yes. The plans are to run an ad in the newspaper.

Man 1: What shall we expect out of the municipal court that you want me to know?

Mayor: I want you to know that I can't respond to that question at this time.

Man 1: Seems your evading...

Mayor: I'm sorry.

Man 2: I don't know if it has anything to do with more money. I know that Red Bank took in more money that we did. Good for Red Bank... I hope and pray that thats not what we are up against ... and you don't have to respond but I just want to say as a businessman...

Mayor: That is not our intentions.

Man 4: I believe Judge Summers ... probably in 1970. To my knowledge he was not a judge ... and I think anyone of us if we had trouble ... or was guilty or whatever we would like for our Court to defend justice and I think that if any of us were going before a judge we would also like for us ... We would hope that whatever happens or whomever you select in order to take a vote ... in an area with the Court to raise funds. Everybody should raise the funds. You can raise them now from the taxpayers...

Mayor: Thank you.

Man 5: Honorable Mayor?

Mayor: Yes sir.

Man 5: About 11 years ago I was in the government ... come to City Hall, but it looks to me that you can't give a specific reason why you are taking the position. I am going to stand and desire ... and I don't want any part of that and I hope that if you employ someone

like that it won't be a cashier's court out of it.

Mayor: Thank you.

May 6: Mayor?

Mayor: Yes sir.

Man 6: I do have confidence in you men and believe that you are men of integrity and I don't know too much from a legal standpoint if you started answering all of our questions right now it would really foul up a bunch of things. And the way I feel about it, ultimately I don't like the vote you have taken tonight. I will vote against you in the next election, but I'm not a single issue voter. But I do have enough confidence in you men to respect you for whatever you did as long as you feel like that you are doing what is right and what is best for our City.

Mayor: Thank you.

Man 7: We have been concerned quite some time for the leniency of the Court regarding DUI's. Those of us who have picked little children killed by drunk drivers. We know that this is all about and we have been very concerned about the City Court in regard to drunk drivers. If this is the reason we want you to know that we are behind you 100%.

Mayor: Thank you. Mr. Summers would you like to make a statement.

Summers: Yes I would Mr. Mayor. I would like to have just a second to distribute some material that I would like everyone to see. I was prepared to start at 7:30. I did not know I had been already removed at the time I got here. But I would like to take a minute to distribute some material.

Mayor: Yes sir.

Summers: I will be right back. Thank you.

Mayor: What we are going to do is adjourning to a beer bond meeting until Mr. Summers gets back. This meeting is adjourned just until he returns.

Comm. Gentry: First Item of business is the approval of the minutes of August 1, 1985.

Vice Mayor Ables: I move it to be approved.

Mayor: I second it.

***

Mayor: Anytime you are ready, Mr. Summers, we are ready.

Mr. Summers: Thank you. Let me say first of all that I am not here for the purpose of arguing the galaxy or whether you have a violated the sunshine law. I think you have but I don't think that is the issue here. I am not here to try to save a $300 month year that I have had for 14 years but you start at $150 a month. First thing I would like to say is those of you that are here I would like to thank you for the opportunity of serving the City of Soddy Daisy. When I interviewed some 14 or 15 years ago, I asked two things and I see some of the commissioners are still here that they would not ask me to run a cash register court and second not to inject politics into the City Court of Soddy Daisy. That I would try my best to up and provide the people of this community with fair and equal justice. I am a human being and I of course have handled thousands of cases. I have made a mistake like any other person will. But for 14 years there have never been any accusation about me as an individual up until the past few months. I want to say this in regard I passed out a lot of statistics and the first thing I want to do to is the reasons in regard when I was asked to meet with this Commission. I will say this very candidly, I am not a newcomer when it comes to politics and if this Commission and I feel like that when people come in that they certainly have the right to put their people in to make a

change. In 14 years this is the first time I have ever been to City Commission meeting. Other than the night that I was sworn in. I have never asked anyone to support candidates, I have never been against the Commission. I have never been against any police chief or any City Manager. Now I have heard different rumors that certain people wanted their friends to be City Judge of City of Soddy Daisy. That's fine. I have no problem with that. But if it had been approached on that at the very beginning I would have said fine, I will move on. But it hasn't worked that way. It is worked that there have been innuendos and rumors and some people in regard that have said things and I have came up here to answer any questions in regard to some people. I know some people are here are upset about the way I handled a case one night and I think she called me the next couple of days or one of her friends in regard about that in some respect. So I have to say I am a human being and I make mistakes. But there are two things that I am concerned about. I am concerned about this community and I thank the people that have come here to support me. I have a lot of friends and I publicly acknowledged that I was proud to be the Judge of Soddy Daisy. I think you all know my law practice is a little bit better than what I make with the City. But when the people of Soddy Daisy make fun of it I have never back off from the fact that I was a Judge of this community and if it is to last night, I say go to here and think. You have given me a lot more than I have given you and I appreciate the opportunity to serve you. But there are two things that concern me. The image of what I think the last few months I have been under tremendous pressure to increase the revenue of this City. You cannot do that through the Court. The fines are laid. The majority goes to the State of Tennessee in the first place... The second thing is the police department. Some members of the police department to run a campaign behind my back, say things to commissioners and never give me opportunity and all I hear is one side of it in regard to things I am supposed to have done. I came up to listen to anyone that wants to say I have done anything wrong. That's why I am here. The second thing is if they can talk freely and unfortunately they can't the majority of the officers over the years that I supported and back them up. I have met with them. I have this package material and I gave the commissioners a whole lot more when we

met several weeks ago. We talked about getting some of view points on some of these matters. I think I supported the police officers. Now you have some good police officers here but you have some others that had better watch it. You have some if you will check in the background you will find they let the other police department under bad circumstances. Those same people are exactly the ones that have caused some of this problem. Commissioners you have the right to do what you want to. None of you have ever come to me other than the night at that one meeting and said Officer so and so said this. I have offer to meet with the police department on every occasion throughout the years. I have got stacks of letters I wrote each one of you all a letter when you came and said I will be glad to meet with you. We met the other night and it wan't you said I was lenient on DUI's you want to increase the fine and I agreed to increase the fine. The last time we had Court if you will check the last we had 9 DUI's if you will look at the file there 9 DUI's and those were all first offenders. Mr. Gentry was here and then left. All first offenders were fined $250.00 and costs and 11/29 like you indicated you wanted me to do. I found out today that somebody at the police department had gone and told some of you that I went back to my old policy as soon as you left. That doesn't bother me for anybody to watch what I do. Because what I do I've done right here. There has been nothing in the back room that has not helped anybody in any form or fashion. And I have taken a lot pressure off police and all the commissioners. The people of Soddy Daisy should be treated fair and you will have no problem. Historically, they don't like people that up and cut deals for people and so forth, and I have done everything I have done in open Court. No one has ever been dismissed outside this Courtroom. The problem, the big problem about this is about the police department. I quote Justice Joe Henry of the Tennessee Supreme Court. "You are members of the legislative branch and so are the police are the executive branch. The judiciary." As far as back as 1700 and I can quote you from Madison Paper in regard to the fact that doctors separation of powers is one...the foundation from where this country's democracy is based." Justice Henry in 1978 talked about the judiciary being taken over other branches of government. Now in regard to the DUI problem, I think some of the

members of Ministerial Association have been to see me. Here is a letter that I gave the commission and I want if I may want you to read it. If you will read this letter and what it says. I hope everybody has a copy. I am very much concerned about the DUI problem but the DUI problem is much more complex than just putting everyone in jail. First of all, this is a file from Mr. Sitton who conducted the survey of the DUI cases in this county. And what does it say, I have just concluded my annual review of DUI School referral and I am pleased to report that once again Soddy Daisy...for a repeat of first offenders driving under the influence.. We have discussed on many occasions over the past 10 years... it goes on down, but there is also statistics in this package Gentlemen, Ladies and Gentlemen that (... unintelligable) can be. In 1983 there were 2 people killed up here. We won an award I have been informed I believe it was that year for safety on the streets of Soddy Daisy. I can't take the credit for all of it. The police department has worked together with the Court In 1984 there was 1 person killed on the street of Soddy Daisy and that was non alcohol related. In 1985, there has not been anyone killed. In regard if you look at the rest of records I have submitted to you that if you will check and see what happened to DUIs I believe the people going to driving school understand what happened if I am lenient these people up here did not object to my policy and nobody else has ever objected to it with the consideration. If you are a prohibitionist and against alcohol that is one thing, just say so. But if you say I am being unfair I would expect you to look at those statistics, because everybody there that has been on DUI case you will find that less people have walked out of this Courtroom without paying a fine on reckless driving or DUI. If anybody is admits other than a first offender and if you read that affidavit, the affidavit is attached to the back that puts a person under oath to swear that they never had a previous DUI. You go to any other Court in this county and you find people down to about 4 or 5 previously DUIs. I take into consideration a person's background on the first offense. But I look to records after that and I think we have been firm but we have been fair. I have opened this Court and closed this Court with everybody having the right to objection. I think it is in the best interest that people should let things cool off and so forth. No body ever complains about this. Like I said, I am

human being and I made a mistake and I have to live with that. What concerns me about it is that there a couple of police officers that have such things. To question what I consider to question the honor of my integrity and I am here for anybody to accuse me of anything they want to. I want to say this very simply that I could take a lot more time to talk about it but it would be a real honor for me to serve with Court and I have many friends here and I do appreciate those who came up here to speak for me. The question remains I have been independent and I think that is what judges are supposed to do. I want you to understand I have offered to speak Ministerial Association on several occasions and I don't know if that message ever got back to them. I hope today I have had an opportunity to talk to you about your concern of everything. I want you to understand I will answer any question that you have, because I am concerned about it. I want you to understand and look at the facts and figures at what has happened in the Court, and what it is the police officers get upset because on the first offense speeding ticket. I believe that radar is the controlling factor. In regard to the fact that people who had no prior record, I take that into consideration and I dimiss it in a lot of cases. But I ask you to look at the record in regard to the fact after they have made more than one record as for speeding they get fined. I have sent young people to defensive driving school instead of making their insurance go sky high and their parents have to pay $1,200-$1,500 a year I send them to driving school and none of those teenagers to my knowledge has ever come back to this Court. I am not important, I want you to understand that. I am the least important. This community is much more important than Jerry Summers. If you think you can let the police run me off and you turn this into a cash register court and that would be bad for the community. I want to thank you once again for giving me time and I want to thank all of you who came on my behalf and once again I say it is an honor for me and it would still be an honor for me even if this is my last night to service the citizens of this community and I wish this community nothing but good things. You are all good people.

Man 4: May I say something Mr. Mayor.

Mayor: Yes sir.

Man 4: I would like to say something to Mr. Summers regarding his statement... I don't really appreciate you just making a vague casual reference to someone on this commission who is going to get their buddy or friend, I don't believe that and to begin with I think it will make the people here suspicious of everyone and all the thief's problems is some of that had student background ... that's what makes our community suspicious of the entire police department and that is the worst thing that could happen to this community, not trust our commissioners and not trust our police department.

Summers: I don't think it is specifically the commissioners or the police officer. When I met with them I spoke specifically and I will be glad to speak with you specifically because I think that you should be aware of the fact that ... Anything that I say I mean that I am unimportant and what I think I am trying to better this community.

Man 4: People are going to be suspicious.

Summers: Well, the people are going to suspicious but I think there are some people that will believe what I am saying is correct.

Man 5: May I say something, Mr. Mayor?

Mayor: Yes you may.

Man 5: I am the pastor of the First Pres. Church. I am not sure whose side I am on or what I want to say. But what you have said and letters that you have passed out and the very brief time that I've had to scan them. Some of my brethern, Ministerial Association, I have a personal reason to appreciate very much #1 the first offender law in the State of Georgia and #2 and a compassion and understanding yet fair judge who has called a member of my family to make a second start after being arrested for a similar offense. I believe that I came here to support the City Council because of Carl and to support the council and their move to dismiss Mr. Summers

or Judge Summers. If what you say you are doing is a fair reflection of the work that being done in this community then I believe that I am coming to a change in my understanding and support. I would like to see a continuation of a program for which first offenders have a second chance for making a new life.

Summers: May I respond to that ... This city has not been sued but one time in 14 years in City Court. But what I am saying is one thing I had to do is deputize the members of the police department in order to serve ... The second thing I have asked to do is set a schedule of bonds ... I don't like to be called late at night but that is part of my duties and I have never shunned it and I have accepted that responsibility. It is not what's happen so far but what can happen is that you allow a police officer to recommend a bond ... instead of called a judge to make a determination taking into consideration that person's background. I can tell you that there is a tremendous potential there for corruption but I can tell you that there are good bondsmen and bad bondsmen but if the police department has the authority to recommend their bond be $5,000 instead of $1,000 the bondsmen is going to make $400 more on that particular case. I can tell you that there is going to be some money swap hands ... but when I recall Mayor Thompson that we were going to make a change ... I'm not going to get into that at this point. I just want you people to know what is going on. This community will be here after I am gone. There are two things that I have done wrong 1) I was not making the fines high enough and 2) because some officers did 'think I back them up on speeding tickets and that's what the Chattanooga Times and Free Press say. I have given you my feelings about radar. Radar to me is not getting revenue from any community, it is for the purpose of slowing people down ... Thank you.

File Ref: 3

REPORTER'S CERTIFICATE

STATE OF TENNESSEE
COUNTY OF HAMILTON

I, Sara Burris, City Recorder for the City of the Soddy Daisy, Tennessee, do hereby certify that the foregoing transcript is true and correct to the best of my knowledge and belief.

In witness whereof, I have hereunto set my hand this _____ day of _____, 1986.

_____
SARA BURRIS

Sworn to and subscribed
before me this _____ day of
_____, 1986.

_____
NOTARY PUBLIC
My Commission Expires:_____

Carbon copy of this transcript was mailed to:

Mr. Jack Brown
Mr. Bob Moon
Mr. Michael Cody

File Ref: 3

TO THE HONORABLE HOWELL PEOPLES
PRESIDING CHANCELLOR IN THE CHANCERY COURT
OF HAMILTON COUNTY, TENNESSEE

JERRY H. SUMMERS,	*	
	*	
Petitioner	*	
	*	
Vs.	*	
	*	
MAYOR ROBERT L. THOMPSON, COMMISSIONERS JAMES ABLES, DON GENTRY, BRYSON JOHNSON, and **JIMMY WILLIAMSON** a/k/a **THE CITY COMMISSION OF SODDY-DAISY, TENNESSEE** in their capacities as Commissioners of the City of Soddy-Daisy, Tennessee; **ROBERT ECKARD,** in his capacity as Police Chief of Soddy-Daisy, Tennessee; **THE CITY OF SODDY-DAISY, TENNESSEE,** a municipality and **MICHAEL CODY,** Attorney General of the State of Tennessee,	*	NO. _____ Part II
	*	
Defendants	*	

PETITION FOR WRIT OF CERTIORARI

Comes the petitioner, Jerry H. Summers, pursuant to the provisions T.C.A. §27-9-101 et. seq. and sues the defendants, Robert L. Thompson, James Ables, Don Gentry, Bryson Johnson, Jimmy Williamson, Robert Eckard and Michael Cody, and would allege the following facts:

I.

1. The petitioner, Jerry H. Summers, is a licensed attorney in the

State of Tennessee and has served continuously as the City Judge of the City Court of Soddy-Daisy, Tennessee since its creation in 1971 when the City of Soddy-Daisy, Tennessee was incorporated under the authority of T.C.A. §6-20-101 et seq.

2. That Jerry H. Summers has served as City Judge by appointment by the Board of Commissioners since 1971 under the authority of T.C.A. §6-21-501.

3. That the defendants Robert L. Thompson, James Ables, Don Gentry, Bryson Johnson and Jimmy Williamson are the duly elected Mayor and Board of Commissioners of the City of Soddy-Daisy, Tennessee, having been elected by the citizens of Soddy-Daisy, Tennessee in municipal elections held in either 1983 or 1985. Said defendants are sued in their official capacities as Commissioners and not individually.

4. That the defendant Robert Eckard is the duly appointed Chief of Police of the City of Soddy-Daisy, Tennessee, and is sued in that official capacity and not individually.

5. That the defendant Michael Cody is the duly appointed Attorney General of the State of Tennessee, and is sued solely in that capacity so that the question of the constitutionality of T.C.A. §6-21-501 can be decided.

6. That the defendant City of Soddy-Daisy, Tennessee, is a municipality incorporated under the laws of the State of Tennessee and operating under the provisions of T.C.A. §6-20-101 et seq.

II

7. That commencing in the Summer of 1985, the defendant Commissioners and particularly defendants Thompson, Ables and Gentry have attempted to influence the Court to increase the revenue of the treasury of the City of Soddy-Daisy through the judicial system.

8. That the defendant Eckard through his agents and certain members of the Soddy-Daisy Police Department have attempted to circumvent the provisions of the Tennessee and United States Constitution requiring due process of law and probable cause for issuance of arrest or search warrants by asking the Court to authorize the issuance of illegal warrants and to circumvent the Court in the issuance of warrants and the setting of appearance bonds. More

specifically, the defendant Eckard has encouraged his officers to "judge shop" by taking warrants to other judges rather than presenting them to the petitioner for review. That on one specific occasion, because of the seriousness of a particular case, the petitioner advised the Police Department to contact the Hamilton County District Attorney General's office for legal advice to ensure that if a search warrant were to be issued, it would be legally sufficient to conform with the requirements of the Fourth Amendment of the United States Constitution and Article I, Section 7 of the Tennessee Constitution pertaining to searches and seizures. That instead of contacting the District Attorney General's office and then recontacting the petitioner to get the search warrant issued, the police officers went to another member of the judiciary and obtained the search warrant without advising said judicial officer of the fact that they had already talked to the petitioner about obtaining a search warrant and that the petitioner had told them to obtain legal advice from the District Attorney General's office to ensure that a valid search warrant was issued. That as a result of said illegal action, the District Attorney General's office was forced to substantially reduce the charges on a defendant in the possession of a large quantity of narcotics in the Criminal Court of Hamilton County, Tennessee, Division III.

9. That on August 30, 1985, the defendant Eckard wrote the petitioner, asking him to deputize certain members of the Soddy-Daisy Police Department to allow them to issue arrest warrants without having to contact the petitioner. Said letter is attached as **Exhibit A.**

10. That on September 12, 1985, the petitioner responded to the letter referred to in Paragraph 9 by advising the defendant Eckard that said requested action was illegal and would be in violation of the Tennessee and Federal Constitutions requiring that warrants be issued by a "neutral and detached magistrate" and would further be in violation of petitioner's responsibility as a judicial officer. Said response to defendant Eckard's letter is attached as **Exhibit B.**

11. That on September 13, 1985, defendant Eckard wrote the petitioner requesting that he set up a standard bond schedule in order that the clerks of the Soddy-Daisy Police Department could set appearance bonds rather than having the petitioner set said bonds in

accordance with his judicial responsibilities. Said letter of defendant Eckard is attached as **Exhibit C.**

12. That the petitioner, on September 17, 1985, responded to the letter referred to in Paragraph 11 by advising that said proposed bond schedule did not satisfy the requirements of Tennessee Law pertaining to the setting of appearance bonds by a judicial officer and would further delegate his responsibilities as a judicial officer Said response is attached as **Exhibit D.**

13. That on July 24, 1985, the defendant Robert L. Thompson wrote the petitioner a letter asking the petitioner to either respond in writing or to meet with the defendants to discuss items they felt needed immediate attention. Said letter is attached to this Petition as **Exhibit E.**

14. That the petitioner immediately informed the defendants that he would be glad to meet with them to discuss the items contained in the letter of July 24, 1985, or any other matters pertaining to the operation of the City Court of Soddy-Daisy, Tennessee.

15. That the defendants scheduled a meeting at the City Hall of Soddy-Daisy, Tennessee on August 6, 1985, and the petitioner and all the defendants except Williamson appeared.

16. That on August 6, 1985, the petitioner provided each of the defendants with a letter and lengthy package of legal, medical and scientific authorities to inform them of some of the legal requirements concerning said issues as well as constitutional prohibitions against some of the matters advocated by the defendants. A copy of the cover letter to said material is attached as **Exhibit F.**

17. That on August 6, 1985, petitioner informed the defendants that he welcomed the opportunity to meet with them because he felt that certain individuals including a small minority of police officers within the Soddy-Daisy Police Department were questioning his honesty and integrity. Defendants responded that they certainly did not question the petitioner's honesty and integrity, but merely wanted to discuss with him and get his comments on the items contained in the July 24, 1985, letter.

18. That the main thrust of defendants' inquiry at said meeting was the setting of fines in reckless driving and radar cases. At no time did the defendants voice objections about the manner in which

petitioner had been handling driving under the influence cases except to request the petitioner to consider raising the fines in reckless driving cases to $250.00 from $100.00 where drinking may have been involved. At said meeting, the petitioner supplied the defendants with a letter from Hamilton County Alcohol Rehabilitation Services Officer Charles Sidden which showed that Soddy-Daisy had the lowest recidivism rate of repeat Driving Under the Influence offenders in Hamilton County. A copy of said letter is attached as **Exhibit G.** The position of the defendants' voicing no opposition to the petitioner's handling of DUI cases is documented in a letter from Mayor Thompson to the petitioner dated August 19, 1985, which is attached as **Exhibit H,** and in letters dated August 21, 1985, and August 26, 1985 from the petitioner to the defendants which are attached as **Exhibits I** and **J.**

19. That on the afternoon of September 24, 1985, the petitioner was called by defendant Robert L. Thompson and was informed that "the City Commission had met and unanimously decided to make a change in the office of City Judge of Soddy-Daisy".

20. That the petitioner informed the defendant Thompson that he had no intentions of resigning and if the defendants were going to fire him, to put it in writing.

21. That on October 3, 1985, at a regularly scheduled Commission meeting, the defendants, acting illegally and without proper notice to the petitioner and citizens of Soddy-Daisy, did fire the petitioner without giving any reason for said termination, although belatedly requested to do so by a large crowd of citizens of Soddy-Daisy at said meeting.

22. That said termination was illegal, arbitrary and capricious for the following reasons:

a) that the petitioner was terminated in violation of Tennessee Public Meeting Act or "Sunshine Law" contained in T.C.A. §8-44-101 et seq. and that no notice was given of any public or special meeting where the termination or firing of the petitioner was discussed.

b) that the subject of the possible termination of the employment of the petitioner was not placed on the agenda of the October 3, 1985, meeting and no notice was given to the petitioner or the citizens of Soddy-Daisy.

c) that the defendants misrepresented to the citizens of Soddy-Daisy present on October 3, 1985, their intention to terminate the petitioner by attempting to make it appear that they were going to employ a Judge Pro Tem who would serve in the absence of the regular Judge.

d) that a motion to terminate the petitioner was made by Mayor Robert L. Thompson, seconded by Commissioner Don Gentry, endorsed by all four (4) Commissioners present without any discussion and in violation of the rights of the citizens of Soddy-Daisy and the petitioner under the First Amendment of the United States Constitution and Article I, Section 19 of the Tennessee Constitution to be heard and express their views under the Rights of Freedom and Speech and Expression.

23. That the defendant Commissioners, Police Chief Eckard and a small minority of the Soddy-Daisy Police Department have conspired to take over the operation of the City Court of Soddy-Daisy, Tennessee in violation of the principles of a "free and independent judiciary" under Article II, Section 1 of the United States Constitution and Article II, Sections 1 and 2 of the Tennessee Constitution.

24. That the provisions of T.C.A. §6-21-501 appointing the City Judge of Soddy-Daisy to "serve at the will of the Board" of Commissioners in unconstitutional and in violation of the doctrine of separation of powers contained in Article III, Section 1 of the United States Constitution and Article II, Sections 1 and 2 of the Tennessee Constitution and the due process provisions of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 8 of the Tennessee Constitution. It is the attack on the constitutionality of this statute that forms the basis for Michael Cody, Attorney General of the State of Tennessee to be joined as a party defendant.

25. That the petitioner's constitutional rights to "due process of law" under the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 8 of the Tennessee Constitution have been violated by the illegal, arbitrary and capricious actions of the defendants' meeting ex parte and voting to fire him without a valid and legal hearing.

26. That in addition to his termination on October 3, 1985, being

in violation of the Tennessee Public Meeting Act or "Sunshine Law", said illegal acts were merely a subterfuge to reaffirm the previously ex parte decision to fire the petitioner in violation of his constitutional right to due process of law under the United States and Tennessee Constitutions.

WHEREFORE, Premises Considered, the petitioner prays that the Court grant the following relief:

1. That the Court issue a Writ of Certiorari to the City Clerk or Recorder of the City of Soddy-Daisy, Tennessee in accordance with the provisions of T.C.A. §27-9-109, requiring the defendants to cause to be made certified and forward to the Chancery Court of Hamilton County, Tennessee, a complete transcript of the proceedings in this cause at any special or regular meeting of the defendants which resulted in the termination of the petitioner on October 3, 1985.

2. That the Petition for Writ of Certiorari be granted.

3. That the Clerk and Master send by Registered, Return Receipt mail, a notice of the filing of said Petition and a certified copy thereof.

4. That proper process issue requiring the defendants to answer within the time prescribed by law, but their oath to their answers are waived.

5. That a hearing on the merits be held in this cause.

6. That upon the hearing of said petition and the proof in this cause, the Court issue an Order restoring the petitioner to the position of Judge of the City Court of Soddy-Daisy, Tennessee.

7. That the Court issue a permanent injunction restraining the defendants from attempting to discharge the petitioner from his position as Judge of the City Court of Soddy-Daisy, Tennessee without sufficient and legal cause.

8. That the petitioner be entitled to back pay, expenses and reasonable attorney's fee from the defendants.

9. That the Court grant the defendant any other general relief to which he may be entitled.

JERRY H. SUMMERS, Petitioner

By /s/ JACK BROWN
Attorney for Petitioner
540 Pioneer Bank Building
Chattanooga, TN 37402
267-0422

EXHIBIT A
MEMORANDUM

TO:	Judge Jerry Summers
FROM:	Chief Eckard
DATE:	August 30, 1985
SUBJECT:	Affidavit's of Complaint

Tennessee law requires all affidavit(s) of complaints be sworn and subscribed by Judge or Clerk.

We are requesting that Court Clerks Jewell Brown and Sylvia Lovelady along with a couple of other individuals, we would appoint as assistant clerks, but authorized by you, in writing, to swear the Affiant on the Affidavit of Complaint.

/s/ Chief Robert D. Eckard

EXHIBIT B

TO: Chief Robert D. Eckard
FROM: Jerry Summers
DATE: September 12, 1985
SUBJECT: Affidavits of Complaint

This will acknowledge receipt of your memo of August 30, 1985, which I received on Saturday, September 7, 1985.

You have stated correctly that Tennessee law does require all affidavits of complaints to be sworn and subscribed to by a judge or clerk.

I have no problem with your request that Court Clerks Jewell Brown and Sylvia Lovelady be authorized to swear the affiant on the affidavit of complaint as this has been a practice which has been routinely followed by our Court for several years. However, I do have some concern about non-lawyers making a decision as whether to issue a warrant and to make a determination of what constitutes sufficient legal facts to constitute probable cause for the issuance of a warrant. We have had no difficulties in this area to my knowledge over the years that we have followed this procedure.

As expressed to you over the telephone on September 9, 1985, my main reservation about establishing this type of procedure would be if someone should get the erroneous impression that Jewell and Sylvia are authorized to start issuing warrants. I do not believe this would be fair to them, and I think that it could lead to some potential problems of liability for the City.

As further indicated to you on the telephone, I accept as part of my responsibilities of the office of judge the fact that the officers and clerks routinely call me on whether they should issue a warrant. Of course, this is sometimes inconvenient, but it is one of the things that I feel comes with the office I have held for 14 years and believe that the procedure we have followed in the past has worked, is working, and will continue to work in the future. There, of course, also remains the potential problem of being unable to locate me or some other judge in a specific case, but, fortunately, we have been able to resolve this difficulty adequately in the past and, hopefully, we will continue to do so in the future.

Thank you very much for contacting me about this matter, and I will be glad to discuss it with you or any other members of the police department or commission upon request.

JHS

je

cc: Mayor Robert L. Thompson
Vice Mayor Jim Ables
Commissioner Don Gentry
Commissioner Bryson Johnson
Commissioner Jimmy Williamson

EXHIBIT C
MEMORANDUM

TO:	Judge Jerry Summers
FROM:	Chief Eckard
DATE:	September 13, 1985
SUBJECT:	Appearance Bonds in the City of Soddy Daisy

Judge Summers, we are enclosing a copy of the list of Bond Schedule that the Red Bank Police Department is now using as set up by William L. Brown, City Judge for the City of Red Bank.

Would you please furnish us with a Bond Schedule for the Police Officers at Soddy Daisy Police Dept. We feel that such a schedule would be very beneficial to our department.

/s/ Chief R.D. Eckard

BOND SCHEDULE

$500	Drag Racing—State
$500-$1,000	DUI—State—Local Residents
	(Ham. Co.) Out of State or non local State
$5,000-$25,000	Arson-State
$500-	Assault & Battery (Simple)
$1,000-$2,000	Assault & Battery (Aggravated)
$1,000-$10,000	Felonious Assault—State
$500-$1,000	Unlawfully Carrying Pistol—State
$2,500-$5,000	Illegal Weapon—State
$500-$1,000	Bribery—State
$500-$1,000	Carrying Dangerous Weapon—State
$250	Disorderly Conduct—City
$500-$1,000	Indecent Exposure—State
$1,000-$5,000	Forgery—Passing Instrument
$1,000-$10,000	Extortion
$500-$1,000	Gaming—Professional Gaming
$250-$500	Public Drunk & Disorderly
$1,000-$5,000	Larceny
$1,000-$10,000	Grand Larceny
$1,000-25,000	Manslaughter
$2,500-$5,000	Receiving & Concealing Stolen Property
$1,000-$2,500	Possession of Stolen Property
$500	Resisting Arrest
$5,000-$50,000	Armed Robbery
$5,000-$25,000	Strong Armed Robbery

NO BOND—RAPE ***
NO BOND—MURDER***
NO BOND—KIDNAPPING***
NO BOND—FUGITUVES***

$1,000-$5,000	Burglary—Attempted
$1,000-$5,000	Burglary of Dwelling
$1,000-$10,000	Burglary of Business
$500	Possession of Marijuana
$1,000-$5,000	Possession of Marijuana for Resale

$1,000-$2,500	Possession of Controlled Substance
$1,000-$2,500	Possession of Control Substance for Resale
$500-$1,000	Possession of Legend Drugs
$1,000-$5,000	Possession of Legend Drugs/Resale
$1,000-$5,000	Possession of Liquor for Resale
$250-$500	Vandalism
$250-$500	Violation Auto Registration
$500	Violation Driver's License Law

TRAFFIC OFFENSES ADOPTED BY CITY ORDINANCE AND ALL OTHER CITY ORDINANCE VIOLATIONS—$250.00

/s/ William L. Brown, City Judge

EXHIBIT D

TO: Chief Bob Eckard
FROM: Jerry Summers
DATE: September 17, 1985
SUBJECT: Appearance Bonds in the City of Soddy Daisy

This will acknowledge with appreciation your memorandum of September 13, 1985, on the above subject.

I do not use a list of Bond Schedule such as the one you sent me from Red Bank for the following reasons:

(1) The setting of an appearance bond is a **judicial** function which should be set in an amount to assure the appearance of a defendant and is based on many factors such as type of offense, background of the defendant, recommendation of the officer, ties of the defendant in the community, etc.

(2) It is part of my judicial duties to establish any special conditions that I think are necessary to secure the appearance of the defendant in court such as setting a five thousand dollar ($5,000) bond and informing the bonding company that they will be responsible for 100% of the bond if the defendant fails to appear. This procedure imposes heavier duties on the bonding companies to make certain that the defendant is in court because they will be responsible for the total amount of the bond.

(3) In my opinion, the setting of a bond by a schedule rather than by the judge considering each case and defendant is not only questionable but is potentially dangerous from the positions of liability to the City. I realize that some jurisdictions use it for economy, but I consider the issue of setting bonds to be a judicial function which is part of my responsibilities as judge of Soddy Daisy. The inconvenience of contacting me or another judge in my absence to set a bond is offset by the legality of our court's actions.

(4) Many times there are hot feelings between parties such as a defendant, witnesses, victims, and police officers which must be evaluated by a neutral and detached judicial officer on the issues of setting a bond and authorizing a warrant. The amount of a bond should be based on the criteria I have previously listed above to determine whether the defendant will appear. I have always wel-

comed the recommendations of the arresting officers before setting bonds and many times they have been very helpful to the Court, and I hope they will continue to assist me in the future. Jewell, Sylvia, Jean, and the dispatchers have always provided me, at my request, with valuable information on the background of the parties on countless occasions during the past fourteen (14) years.

(5) The City of Soddy-Daisy derives no significant income from appearance bonds, including forfeitures. Because many of the offenses in our Court involve domestic disputes between local residents, the setting of an appearance bond by a schedule is not only improper but unwise. In many of the assault and battery cases involving ex-husbands and wives the setting of an appearance bond by a schedule can aggravate the situation rather than helping it. Historically, it has been shown that most of these cases resolve themselves before they get to court.

(6) The bond schedule you sent me has been changed by the Tennessee General Assembly in enacting amendments to T.C.A. § 40-7-118 which require that the great majority of all misdemeanors must be cited to court rather than arrest and appearance bonds imposed except under certain specific exceptions. A copy of this statute plus the latest amendments are attached for your review.

(7) I have prepared a short list of appearance bonds which I think expiains the position of the Court on this matter:

BOND SCHEDULE

A. All felonies—contact Judge Summers, or designated judge in his absence, for the setting of the appearance bond.

B. Traffic offenses, except DUI and other offenses which are not covered by the citation sections of T.C.A. § 40-7-118. The offender should be cited to court and his driver's license held in lieu of making an appearance bond. In the event these offenders fail to appear the Department of Safety of the issuing state of his driver's license should be notified by the Clerk's Office of his failure to appear.

C. All DUI offenses but the injuries exceptions contained in T.C.A. § 40-7-118 (1) (b) (1). Set bond at $500 for each offense. If the officer thinks there are circumstances which justify a higher or lower bond in their opinion, they should contact Judge Summers, or

designated judge in his absence, to set the bond.

D. All non-traffic misdemeanors, except DUI, Shoplifting, Issuance of Bad Checks, Driving on Revoked License, Assault and Battery, and Prostitution, **shall** be ordered to appear in court on **citation** rather than **arrested.**

E. Shoplifting, Passing Bad Checks, Driving on Revoked Licenses, Asssault and Battery and Prostitution. These offenses as covered in T.C.A. § 40-7-118 (1) (2) (A-E) contain special confusing sections which allow the officers discretion to issue a citation or make an arrest under certain circumstances.

In order to avoid problems, I prefer that in these cases to have the officers contact Judge Summers, or designated judge in his absence, for the setting of the bond or allowing the defendant to be cited to court.

They have always called the court on these cases in the past, and I have no objection to using this procedure in the future.

F. City Ordinances—$50.00 bond.

8. Hopefully, this schedule will give the police department some further guidance in this area. If you have any questions concerning the contents of this letter, please do not hesitate to contact me at your convenience. At your request, I will be glad to meet with you and the police department to explain this schedule further.

JHS

je

Enclosures

cc: Mayor Robert L. Thompson
Vice Mayor Jim Ables
Commissioner Don Gentry
Commissioner Bryson Johnson
Commissioner Jimmy Williamson
Ms. Jackie Schulten

EXHIBIT E

July 24, 1985

Judge Jerry Summers
500 Lindsay Street
Chattanooga, TN 37402

Dear Judge Summers:

We have reviewed our court proceedings and listed several items that require immediate attention. Please respond to each of the items indicating the direction intended or we will meet with you to duscuss these items at your convenience.

1. Speed gun convictions
2. Stern handling of DUI
3. Respond to probable cause on warrants
4. Eliminate need for informants name on warrants
5. More confidence in Police Department
6. Don't talk down to Police Officers
7. Harder line on Fail to Show cases
8. Public service work for people who can't pay
9. Courtroom demeanor
10. Lack of confidence in Blood Alcohol Tests

Sincerely,
/s/ Robert L. Thompson
Mayor

/s/ Jim Ables, Vice-Mayor
/s/ Bryson Johnson, Commissioner
/s/ Jimmy Williamson, Commissioner
/s/ Don Gentry, Commissioner

EXHIBIT F

TO: Mayor Robert L. Thompson, Commissioners Jim Ables, Don Gentry, Bryson Johnson, Jimmy Williamson, and Chief Bob Eckard
FROM: Jerry H. Summers
RE: Soddy-Daisy Court
DATE: August 6, 1985

Pursuant to Mayor Thompson's letter dated July 24, 1985, and my telephone conversation with him on August 3, 1985, I look forward to meeting with each of you to discuss the matters mentioned in his letter. In order that we will have a full range of discussion, I have also requested that Police Chief Bob Eckard, City Clerk Jewel Brown, and City Attorney Jackie Schulten also be present.

This memo has been prepared in order to facilitate the discussion on some of those issues.

OPENING REMARKS

In 1971 when I was interviewed for the job as City Judge of Soddy-Daisy, I promised the Commission under Mayor Max Orr that I would try and run a firm but fair court if the commissioners would cooperate with me by promising me (1) not to ask me to run a "cash register court," and (2) not to inject "politics" into the operation of the court by asking me to help their friends or political support or to attempt to influence the independence of the court.

I will candidly state that in my opinion those promises have been kept by each succeeding commision the great majority of the time. However, events of the past few months have raised questions in my mind as to persons criticizing my honesty and integrity, and I look forward to discussing all of these matters with you.

I will be glad to discuss in greater detail each of the ten (10) items mentioned in Mayor Thompson's letter of July 24, 1985, at the meeting but have attached the following items as exhibits to this memo for your review and consideration:

A.

(1) 1984 Traffic Report of Chattanooga Area Safety Council indicating that Soddy-Daisy had one traffic fatality in that

year.
(2) Letter to Cheif Eckard with information about Charles Sidden's report.
B.
(1) Article pertaining to legal requirements of radar.
(2) Copy of Tennessee case on radar requirements of **Hardaway v. State.**
C.
(1) A 1983 letter on DUI cases in Soddy-Daisy.
(2) A 1983 report on DUI cases in Soddy-Daisy.
(3) News-Free Press article on Soddy-Daisy.
(4) October 7, 1983, letter to Soddy-Daisy Commission.
(5) April 30, 1984, letter to District Attorney Gary Gerbitz.
(6) Synopsis of recent Tennessee decisions on DUI.
(7) Recent cases pertaining to prior convictions.
(8) Three (3) articles on validity of opinions on intoxication.
(9) Fourteen (14) articles dealing with issues pertainig to problems in determining intoxication.
(10) Tennessee decisions pertaining to admissibility of breathalyzer results and qualifications of machine and operator.
(11) Tennessee Law Review article pertaining to breathalyzer tests.
(12) Three (3) articles pertaining to problems with alcohol measuring machines around country.
(13) Tennessee Bureau of Investigation, Alcohol Outline.
(14) Copy of intoxicator machine 3000 brochure used by Soddy-Daisy Police Department at Red Bank or Hamilton County.
(15) Series of four (4) articles dealing with infrared breath testers.
(16) Medical articles pertaining to physiological errors associated with alcohol breath testing.
D.
(1) Letter to City Attorney on July 21, 1983, advising of statute pertaining to work release programs.
(1) Two (2) articles pertaining to community service programs.

E. The 1985 statute passed by Tennessee legislature pertaining to contempt powers of municipal judges.

F. The 1983 United States Supreme Court decision of **Bearden v. Georgia** pertaining to court costs imprisonment.

I am submitting this material to you in order that you can be aware that we are dealing with rather complex issues that cannot and should not be approached with a simplistic viewpoint.

The other items pertaining to the police department I would prefer to discuss in person rather than put in writing and will candidly address them at this meeting.

Whatever the outcome of this meeting, I wish to state in writing that I have considered it an honor to be the Judge of Soddy-Daisy since its inception. The people of the community have treated me with respect and dignity even when I ruled against them. For this I will forever be grateful.

JHS

je

Enclosures

EXHIBIT G

August 1, 1985

The Honorable Jerry Summers
Judge, Municipal Court
City of Soddy-Daisy, Tennessee

Dear Judge Summers:

Having just concluded my annual review of DUI school referrals I am pleased to report that, once again, Soddy-Daisy Court leads all other referral sources in low recidivism of first offense driving under the influence defendants.

As we have discussed on many occasions over the last ten years, your philosophy of sentencing and deterrence is obviously working.

As you know, we share a common goal...that of eliminating the drunk driver as a threat to our community and I find it fascinating that the incidence of repeat offending has risen in most areas of the county but not yours. Some persons may attribute this to increased enforcement and awareness, but the Soddy-Daisy Police Department is obviously aggressively enforcing the law and Heaven knows that your city and school officials are committed to increased awareness.

My personal opinion is that the judge and community leaders create or eliminate repeat offenses... the judge by being clear, fair and oriented toward the individual case and the leaders by not allowing themselves to be pressured by relatives, neighbors, etc. who often want to "end run" the system. (The old, "justice for all, but 'help' my brother-in-law" bit.)

Thank you for your continued interest and leadership in the anti-drunk driving effort. It was 1972 when you and Pat Hatfield started the first effort in the Southeast to combat the problem. Of the initial group, only you and H.Q. Evatt are active these thirteen years later.

Obviously, you are doing something right and I never argue with success.

Sincerely,
/s/ Charles N. Sidden
Rehabilitation Services Officer

EXHIBIT H

TO: Jerry H. Summers
FROM: Robert L. Thompson
DATE: August 19, 1985

RE: Your letter dated August 21, 1985

We have reviewed your letter indicating the schedule of fines for first offenders and conclude this is not the understanding we had when we met.

Our understanding was that first offenders would be fined $250.00 with charges reduced to reckless driving.

In order we should have a clear understanding of what was agreed upon during our meeting it would be appreciated if each of the subjects in our letter dated July 24, 1985 be addressed specifically in writing to eliminate confusion.

Thanks for your cooperation.

Sincerely,
/s/ Robert L. Thompson
Mayor

cc: Vice-Mayor Jim Ables
Commissioner Don Gentry
Commissioner Bryson Johnson
Commissioner Jimmy Williamson

EXHIBIT I

TO: Mayor Robert L. Thompson, Commisioners Jim Ables, Don Gentry, Bryson Johnson, Jimmy Williamson, and Chief Bob Eckard
FROM: Jerry H. Summers
DATE: August 21, 1985

I am writing to express my appreciation for the opportunity of discussing with each of you the operation of the City Court of Soddy-Daisy and some of the issues confronting the court and the police department.

After our discussion, I have thought about the viewpoints expressed by each of you and would like to submit the following schedule of fines for first offenders charged with Driving Under the Influence cases.

If they are eligible to be considered a true first offender and have signed the affidavit used by our court, then the fine for Reckless Driving would be based upon the blood-alcohol content level of the breathlyzer, intoximeter, or blood-alcohol tests.

Blood Alcohol Content Reading	Fine
.11 to .15	$150.00
.16 to .20	$200.00
.21 and up	$250.00

If you have any problems with this proposal, please contact me at your convenience. This schedule of fines would allow me some flexibility which appeared to be the concern of Commissioner Johnson as well as provding tougher punishment as advocated by Commissioner Gentry. I, of course, may still consider other criteria that might also affect the amount of the fine imposed.

JHS

je

EXHIBIT J

TO: Mayor Robert L. Thompson
Vice Mayor Jim Ables
Commissioner Don Gentry
Commissioner Bryson Johnson
Commissioner Jimmy Williamson
Chief Bob Eckard
FROM: Jerry H. Summers
DATE: August 26, 1985
RE: Your Letter Dated August 19, 1985

The proposed schedule of making the fine in first offense reckless driving cases depend upon the blood-alcohol content reading was based upon Commissioner Johnson's concern to allow the Court to have some flexibility on each individual case. You are correct that I initially agreed that we would make the standard fine for first offense reckless driving convictions based on no prior DUI records to be a fine of $250. However, it was my observation that at least Commisioner Johnson was concerned about this matter being an across-the-board matter.

Please be advised that I will be glad to follow the position of assessing a fine of $250 on the reckless driving offenses but respectfully reserve the right to make an exception when I believe the facts and circumstances so warrant.

Thank you once again for the opportunity of meeting with you on this and other matters.

JHS

je

JERRY H. SUMMERS,	§	NO. 63664
Petitioner	§	IN THE CHANCERY COURT OF
vs.	§	HAMILTON COUNTY, TENNESSEE
MAYOR ROBERT L. THOMPSON, ET AL,	§	Part I
Defendants	§	

AMENDED PETITION FOR WRIT OF CERTIORARI

Comes the petitioner, Jerry H. Summers, and amends the Petition For Writ of Certiorari previously filed in the afore-styled cause as follows:

27. That the 1985 amendment to Tennessee Code Annotated Section 8-44-102 contained in Public Chapter No. 290 granting an exception to the Tennessee Open Meetings for personal matters is unconstitutional and constitutes "class legislation" in violation of Article X, Section 8 of the Tennessee constitution. A copy of said amendment is attached as an exhibit.

28. That to grant the defendants protection under a "personnel exception" violates both the legislative intent of the 1985 amendment and the original Act adopted by the Tennessee General Assembly.

JERRY H. SUMMERS, Petitioner
By: /s/ Jack Brown
Attorney for Petitioner
540 Pioneer Bank Building
Chattanooga, TN 37402

cc: Mayor Robert L. Thompson
Commissioner James Ables
Commissioner Don Gentry
Commissioner Bryson Johnson
Comm. Jimmy Williamson
Chief Robert Eckard
c/o City Hall
Daisy, Tennessee 37319

Mr. Michael Cody
Attorney General
State of Tennessee
450 James Robertson Pkwy.
Nashville, TN 37219

City of Soddy-Daisy
c/o Jackie Schulten, City Attorney
600 Georgia Avenue
Chattanooga, TN 37402

JERRY H. SUMMERS,	§	NO. 63664
Petitioner	§	IN THE CHANCERY COURT OF
vs.	§	HAMILTON COUNTY, TENNESSEE
MAYOR ROBERT L. THOMPSON, ET AL,	§	Part I
Defendants	§	

MOTION TO AMEND
PETITION FOR WRIT OF CERTIORARI

Comes the petitioner, Jerry H. Summers, and respectfully moves the Court to allow him to amend his Petition for Writ of Certiorari previously filed in this cause to allege the following additional facts and cause of action:

29. That the defendants violated the petitioner's civil rights under the Civil Rights Act of 1871 contained in 42 U.S.C.A. 1983, et seq. in that the petitioner was deprived of a constitutionally protected property interest.

30. That the petitioner be awarded damages for the violation of his constitutional rights.

31. That his attorneys be awarded reasonable attorneys fees for the representation of the petitioner in this cause.

JERRY H. SUMMERS, Petitioner
By: /s/ Jack R. Brown
Attorney for Petitioner
540 Pioneer Bank Building
Chattanooga, TN 37402

cc: Mr. Bob Moon
525 Pioneer Bank Bldg.
Chattanooga, TN 37402

Ms. Jackie Schulten
600 Georgia Avenue
Chattanooga, TN 37402

JERRY H. SUMMERS,	)	NO. 63664
VS.	)	IN THE CHANCERY COURT
	)	OF
MAYOR ROBERT L.	)	HAMILTON COUNTY,
THOMPSON, ET AL,	)	TENNESSEE
	)	Part I

MEMORANDUM OPINION

GENERAL DISCUSSION OF CLAIM

The plaintiff, Jerry H. Summers, has sued the individual commissioners who make up the City Commission of Soddy Daisy, Tennessee. Michael Cody, Attorney General of the State of Tennessee has been given proper notice and was named as a defendant inasmuch as the constitutionality of certain laws of the State of Tennessee are challenged.

It appears that the plaintiff served continuously as the City Judge of the City Court of Soddy-Daisy, Tennessee since its creation in 1971 until October 3, 1985. On October 3, 1985, at a regularly scheduled city commission meeting, the defendants, without any notice to the plaintiff, and/or the citizens of Soddy Daisy, terminated the plaintiff as City Judge. At said commission meeting no individual commissioner expressed any reason for said termination and, on the contrary, the mayor refused to discuss same. Apparently the city attorney had advised the commission it was unnecessary to express any reason for the termination and the commissioners chose that course of action.

Plaintiff maintains strenuously that the actions of the city commission were unlawful, unconstitutional, arbitrary and that he should be restored to his position as City Judge of City of Soddy-Daisy. He has asserted many reasons for his complaints which shall be set out more specifically hereinafter.

Defendants answer by pointing out that the state law, which controls the form of government utilized by the city of Soddy-Daisy,

provides in **Tennessee Code Annotated** s6-21-501 specifically that The City Judge serves at the will of the city commission. Thus, it is maintained that the plaintiff has no valid complaint as the city commission merely exercised their authority by terminating the plaintiff.

In anticipation of these defenses petitioner alleged the exercise of the authority and/or the law itself was illegal, unconstitutional, or otherwide exercised improperly.

SCOPE OF REVIEW BY THIS COURT

This action was initiated by a petition for writ of certiorari by the petitioner pursuant to the provisions of Tennessee Code Annotated s29-9-101 et seq. Such provisions pertain to "statutory" writs of certiorari and are for the purpose of reviewing "any final order or judgment of any board or commission..." Upon a hearing, "the chancellor shall weigh the evidence and determine the facts by the preponderance of the proof." TCA s27-9-111 (d). The requirements of a statutory writ of certiorari do not require such be sworn to. TCA s27-9-102. The Petition in this case is not sworn to as is required for a common law writ. TCA s27-8-104. While no specific issue has been raised as to the formalities of an oath, the parties have in the proceedings generally conceded that this court's scope of review is in the nature of the common law writ rather than the statutory writ where a de novo hearing would be appropriate. The distinctions between the two writs are often subtle and difficult to discern. **Review of Administrative Decisions by Writ of Certiorari in Tennessee**, Memphis State University Law Review, Ben H. Cantrell, Volume 4 Page 19. As stated therein,

> "The confusion which exists among the bar and the courts respecting the availability of the common-law writ of certiorari or the statutory writ of certiorari for review of administrative decisions is a burden impeding the fair administration of justice."

Here, however there is no "judicial" function being reviewed and the court is of the opinion that the scope of review is that of a common law writ of certiorari. See TCA s27-9-114 and s27-8-102. Certainly, this court could not conduct a de novo hearing as to the exercise of an "at will" power of a city commission.

Under the common law writ, this court may reverse: (a) where the ruling of the court below represent a fundamental illegality; (b) where the ruling constitutes a failure to proceed according to essential requirements of law; (c) where the ruling can amount to the denial of either party a day in court; (d) where the action of the trial judge constituted a plain and palpable abuse of discretion; (e) where the action of the trial judge was without legal authority; and (f) where either party has lost a right or interest that may never be recaptured. **Tennessee Jurisprudence,** Certiorari, s5. The scope is also stated as to being limited to a determination of whether an inferior tribunal or board has exceeded its jurisdiction or is acting illegally, fradulently, or arbitrarily. Hoover Motor Express v. Railroad & Pub Com., 261 SW2d 233, (Tenn. 1953). Thus, the review of this court is limited to whether the dismissal of the petitioner was: arbitrarily; illegal; or in excess of the commission's jurisdiction.

SPECIFIC ALLEGATION OF COMPLAINT

Rather than "stating briefly the issues involved in the cause" (TCA s27-9-102), the petitioner has filed a quite lengthy petition with numerous acts in regard to the controversies. However, many of these allegations are to support the basis of petitioner's claim that the defendants acted illegally, arbitrarily, and/or capriciously. It would appear that the petitioner claims can be more succinctly stated as follows:

That the reasons for dismissal were arbitrary and illegal;

That the defendants violated the "Sunshine Law" contained in TCA s8-44-101, et seq.

That the failure of the commissioners to give their reasons for his dismissal violated his rights of freedom of speech and expression under the first amendment of the United States Constitution Article 1 Section 19 of the Tennessee Constitution;

That the defendants conspired to violate the principles of a free and independent judiciary under Article III[SIC], Section 1 of the United States Constitution, and Article 2 Sections 1 and 2 of the Tennessee Constitution;

That the provisions of TCA 6-21-501 providing for a judge to

"serve at the will of a board" are unconstitutional and in violation of the doctrine of separation of powers contained in Article III [SIC] Section 1 of United States Constitution and Article II, Sections 1 and 2 of the Tennessee Constitution;

That the actions of the defendant violated due process of the Fifth and Fourteeneth Amendements of the United States Constitition and Article I, Section 8 of the Tennessee Constitution; and,

By amendment, the exception to the "sunshine laws" (TCA s8-44-102) for personnel matters is unconstitutional and constitutes "class legislation" in violation of Article X, Section 8 of the Tennessee Constitution.

Originally, petitioner took the position that the statutory procedures for removal of employees (TCA s6-20-220) were applicable to his dismissal and that such had not been complied with. Such specifically require "specific charges in writing," notice, and a hearing. Thereafter, however, petitioner filed a second motion for Judgment on the Pleadings and asserted that the Court of Judiciary has exclusive jurisdiction for the removal of any judge, including a city judge. See TCA Section S17-5-101, et seq.

PRESENT POSTURE OF CASE

On July 28, the court received briefs and heard arguments on the Motion for Judgment on the Pleadings filed by the petitioner. At that time the court was of the opinion that the matter was not sufficiently briefed by the parties and denied same without prejudice to a reconsideration. Subsequent thereto the parties, through counsel, have been of great assistance in submitting excellent briefs and arguments and the court is of the opinion that an appropriate order, as incorporated herein, should now be entered.

GENERAL DISCUSSION

The City Judge of Soddy Daisy holds court at least monthly. In addition he must be contacted for bonds, issuance of search warrants and other miscellaneous functions. For such, the judge is paid $300 per month. Thus, no great sums of money are involved in this case. Obviously, however, the petitioner was greatly offended by

the actions of the city commission in terminating him, and he has expended considerable effort and time to espouse important and admirable principles of our system of government. The pertinent legislation under question applies to a large number of cities in the state of Tennessee. Thus, this case has considerable import to many municipal corporations (and their judges) across the state. Petitioner is commended for his perseverance and capable assistance to the court in reaching its opinion.

Likewise, counsel for the city and the state have capably shown that the city of Soddy Daisy Commission acted in accordance with the literal language of the pertinent statutes and have thoroughly defended the principle that municipal corporation should not be unnecessarily hindered by abstract principles which are essentially irrelevant to the proper operation of a city or community.

It should be pointed out, however, that the Judge of Soddy-Daisy rules on more than the town's ordinances and violations thereof. "In addition, the City Judge is vested with concurrent jurisdiction and authority with courts of General Sessions of the County, as set forth in Title 40, in all cases of the violation of the criminal laws of the state of Tennessee within the limits of such municipality." (TCA s6-21-501) (a) (2). Thus, Mr. Summers, as City Judge, has the same obligations and powers under the law as a judge of a General Sessions Court. The judges of General Sessions Court are elected by the people for a specific term and may only be removed for cause. In the courts opinion, whether the petitioner could be dismissed without charges, notice, hearing, and other due process procedures hinges completely around the lawfulness of having a judge serve "at will", or at the pleasure of a city commission.

One discharged at the whim of his employer naturally feels unjustly treated and resentful. Nevertheless, in Tennessee, "the law is well established in this state that a contract for employment for an indefinite term is a contract at will and can be terminated by either party at any time without cause. **Graves v. Anchor Water Corporation of Tennessee,** 692 SW2d 420 (Tenn. A 1985). [An Employer] "May dismiss their employees at will be they many or a few, for good cause, for no cause or even for cause morally wrong without being thereby guilty of a legal wrong." **Whittaker v. Caria-Moore, Inc.** 621 SW2d 395 (Tenn. A. 1981). The petitioner

was not hired for a specific term and, in fact, he was on notice that he was hired "at the will" of the commissioners. The doctrine is and has been attacked under contract and tort theories. However, any change in this law must come from the Supreme Court. **Whittaker v. Caria-Moore, Inc.,** Supra

The petitioner intitially contended that he was an "employee" and, therefore, pursuant to TCA s6-20-220, he could only be removed by the board of commissioners "for crime or misdemeanor in office, for grave misconduct showing unfitness for public duty, or for permanent disability, by majority vote..." The court does not construe such language as mandatory where the term of the city judge is elsewhere in the law specified as "at will." The provisions are inconsistent.

If the "at will" employment of the city judge is lawful, the vast majority of grounds asserted by the petitioner must fall by the way side. Obviously, if the commission may terminate the petitioner at will, such termination is valid even though it might be arbitrary and capricious. Likewise, there would be no requirement of specifying a charge nor giving notice prior to the termination.

The United States Supreme Court has considered on several occasions the termination of public employees and found in certain instances that termination had been in violation of the protection of the Due Process Clause. **Cleveland Board of Education v. James Loudermill, et al.,** 470 U.S.__, 84 L Ed 2D 494 (1985). Therein, the United States Supreme Court found that the public employee involved had to be given a pre-termination opportunity to respond to charges against him as a matter of Due Process. In effect, if an employee has "property" interest in continued employment, he must be afforded notice of charges against him and a hearing opportunity to respond to those charges. On the other hand, property interests are not created by the Fourteenth Amendment and to be entitled to those guaranties of the Due Process Clause, the employee would be required to show that he had a "property" interest in continued employment at the time of his termination. **Duncan v. City of Oneida, Tennessee,** 564 Federal Sup 425 (Ed District, 1983).

A property interest in employment can, of course, be created by ordinance, or by implied contract. In either case, however, the sufficiency of the claim of the entitlement must be decided by

reference to state law. **Bishop v. Wood,** 426 U.S. 341, 48 L. Ed. 2d 684 (1976) Thus, an employee at will has no property interest in continued employment under the law of the State of Tennessee.

Petitioner has shown the court no authority that a discussion of personnel matters outside the commission meeting constituted a violation of the "Sunshine Law," or that the "personnel" exception is unconstitutional. Likewise, there appears to be no merit in the contention that the petitioner's right of free speech was violated. Therefore, the court is of the opinion that the sole issue of merit concerns the constitutionally of the "at will" Doctrine.

CONSTITUTIONALITY OF AT WILL DOCTRINE

The only legitimate attack of the petitioner upon the at will tenure of his position as City Judge hinges around Article II, Sections 1 and 2 of the Tennessee Constitution. These provide as follows:

> Section 1. **Division of Powers**—the powers of the government shall be divided into three distinct departments: the Legislative, Executive, and Judicial.
>
> Section 2. **Limitation of Powers**—No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted.

In the court's opinion, the principle of the separation of powers as contained in the United States Constitution applies solely to the three branches of the Federal Government created by that constitution. Thus, such is not involved herein.

The petitioner contends that any City Judge serving at the will of the board of commissioners is rendered a mere arm of the Board rather than a independent judicial officer. Charged with the judicial functions indentical to the general sessions judges, petitioner contends that he—or any other similarly situated judge—can be subjected to the pressures and control of the legislative body who appoints him and who can dismiss him at their whim.

The Tennessee Supreme Court recognizes the doctrine of separation of powers as a "fundamental principle of American Constitutional Government." **Underwood v. State,** 529 SW2d 45 (Tenn.

1975). However, as stated therein, "it has long been recognized that it is impossible to preserve perfectly the theoretical lines of demarcation between the Executive, Legislative, Judicial branches of government." Also,

> The Constitution does not define in express terms what are legislative, executive, or judicial powers." And... "A Legislative enactment which does not frustrate or interfere with adjudicative function of the courts and does not constitute an impermissible encroachment upon the judicial branch of government."

The Tennessee Constitution provides specifically for corporation courts. In Article VI, it is provided:

> Section 1. **Judicial Power.**—The judicial power of this State shall be vested in one Supreme Court and in such Circuit, Chancery and other inferior Courts as the legislature shall from time to time, ordain and establish; in the Judges thereof, and in the Justices of the Peace. The legislature may also vest such and jurisdiction in Corporation Courts as may be deemed necessary. Courts to be holden by Justice of the Peace may also be established.

It is clear that not all of the other section of Article VI, Tennessee Constitution, apply to "Corporation Courts." Section 4 pertaining to the election of the judges of inferior courts and the term of eight years does not require that corporation courts judges be elected by the people. **Elizabethan v. Carter County,** 321 SW2d 822, (Tenn. 1958). Also, it was stated therein:

> "There being no constitutional requirement that the judges of corporation courts, whether they be called police court judges, recorders, the mayor of the city or what not, be elected by the people of the municipality, it is necessarily true from the nature of municipalities that the legislature may directly provide for either the election or the appointment of same or it may confer the power upon the municipality."

Section 15 of Article VI orginally provided, before repeal that Justices of the Peace were to be elected for terms of six years. Such demonstrates that "inferior courts" in Section 1 did not include justices of the peace or corporation courts.

The state ably points out a number of courts in sister states have held that the separation of governmental powers do not apply to municipal or city governments. See **Eggers v. Kenny** 104 A 2d 10 (NJ. 1954); **City of New Orleans v. Borey,** 52 So 2d (28) (LA. 1951): **Gaud v. Walker,** 53 SW2d 316 (S.C. 1941): **State v. Lane,** 62 So. 31 (AL. 1913): and **Bryan v. Voss,** 136 SW 884 (KY. 1911). The common reasoning upon this line of cases appears to rest upon the theory that state constitutional provision mandating the separation of governmental powers apply only to arms of state government.

The State's reasoning that the separation of powers of the Tennessee Constitution does not apply to municipalities would be appealing but for the fact the City Judge applies the laws of the State of Tennessee. A possible argument might be that the delegation of those powers was unconstitutional itself and, therefore, the separation of powers doctrine would be inapplicable. However, under **Tennessee Constitution,** Article VI Section 1, the legislature has the power of conferring jurisdiction of criminal offenses against the state and may add this to corporation courts or withdraw it, in its discretion. **City of Knoxville ex rel Roach v. Dossett,** 672 SW2d 193 (Tenn. 1984).

Finding no Tennessee reported decision exactly on point, this court considers cases from other jurisdictions which are very similar to the issue herein. The Montana Supreme Court considered an application for a writ of prohibition to prevent the plaintiff's termination as a police judge in **Morales v. City Commission, etc.** 570 P. 2d 887 (Mont. 1977). The plaintiff has been appointed to "hold his office at the will of the commission." He was notified of his intended termination prior to the end of his term. He sought to prohibit same on the basis such was in violation of the separation of powers doctrine of the Montana Constitution. The 1972 Montana Constitution, Article III, Section 1, was almost identical to that of Tennessee. The Montana Supreme Court, citing an earlier case, stated:

> "...It is within the knowledge of every intelligent man that its purpose is to constitute each department an exclusive trustee of the power vested in it, accountable to the people alone for its faithful exercise, so that each may act as a check upon the

other, and thus may be prevented the tyranny and oppression which would be the inevitable result of a lodgement of all power in the hands of one body. It is incumbent upon each department to assert and exercise all of its power whenever public necessity requires it to do so: otherwise, it is recreant to the trust reposed in it by the people. It is equally incumbent upon it to refrain from asserting a power that does not belong to it, for this is equally in violation of the people's confidence."

Even though a municipal government was involved, the Court was of the opinion that the City Commission, acting as the legislative branch of City Government, could not infringe upon the duties of the judicial branch. "The power to remove the police judge...is an impermissible infringement upon the duty of each and every judge to render a fair impartial decision."

The state law allowing the termination of a city judge at the will of the City Commission was found to be unconstitutional.

In Arizona, two magistrates who had been dismissed by their town councils pursuant to ordinances permitting their dismissal at the pleasure of the council, brought separate actions to regain their judgeships. **Winter v. Coor,** 695 P2d 1094. (Ariz. 1985). Arizona's constitutional provisions as to separation of departments are similar to those of Tennessee. But, as the State of Tennessee argues herein, the town argued that the doctrine of separation of powers at the state level did not apply to municipalities. Thus, the primary issue was whether town magistrate courts are a part of the state's judicial department. Said magistrate courts had concurrent jurisdiction with the justice courts "of violation of laws of state committed within the limits of the city or town" in addition to their own jurisdiction in cases arising from violations of town ordinances.

Nevertheless, defendants argued the absence of specific reference to magistrate courts in the Arizona Constitution precluded their inclusion as a part of the state's judicial department. Also, Arizona historically followed the same "employment at will" rule that, absent any specific agreement to the contrary, an employment relationship without a fixed period is terminable at the will of either party at any time without cause or liability. The Arizona Supreme Court was impressed, as is this court, with the forceful dissent of

Justice Carrigan in **People of City of Thornton v. Horan,** 556 P. 2d 1217, (Co. 1976) cert. denied 431 U.S. 966 (1977).

In **Thornton,** Justice Carrigan stated:

> "No insulation is provided to insure the judges independence. There are neither provisions for a fixed term of office, nor guidelines for removing the judges for cause. For example, if the city council disagrees with a judges' interpretation of a particular ordinance, it may remove him and immediately substitute a judge whose interpretation of the ordinance accord with that of the majority of the city council. Similarly, if the city council feels that the judge is imposing inadequate fines and thus the city revenues are suffering, he can be told to increase the fines or face immediate discharge. In fact, a Thornton Judge could be removed in the midst of a trial if one of his rulings were distasteful to the majority of the city council... The situation is abhorrent to the concept of fundamental fairness and so inherently likely to deprive the court of real independence to deny litigants opposing the city the impartial tribunal required as an element to due process. The implicity and omnipresent threat that a Thornton Judge can be removed immediately without cause hangs like the sword of Damoceles above his head as he rules on cases. The single hair by which it hangs is the "pleasure" of the city counsel whose attorney litigates before him.

The Arizona Supreme Court considered the large number of cases filed in the states' municipal courts and pointed out such "underscores the necessity of maintaining courts as fair, independent, and impartial tribunals and the importance of preserving the public's perception of these courts as impartial and unbiased."

The ordinance was deemed to be in violation of the constitutional provisions and the towns were ordered to reinstate the magistrates.

Although the result in **Thornton** is contrary to that of **Morales** and **Winters,** it appears that the Colorado Constitution does not contain a separation of powers clauses.

The possible abuses attendant to a dependent judiciary expressed in Justice Carrigan's dissent are of the type alleged by the petitioner herein. Whether such are real, imagined, or groundless, they nevertheless, seriously detract from the public's confidence in our judi-

cial system. Likewise, the allegations, coupled with the potential of lack of judicial independence, undoubtedly erode the confidence of the citizens of Soddy-Daisy in their city government. Any termination of their city judge could be labelled as "political", or even, as here, retaliation for the judge's independence.

In this year of the Bicentennial of our U.S. Constitution, we are reminded of the primary driving needs that precipitated our federal constitution. One was to establish a stronger central government. Another was to protect the people from that central government and preserve the rights and liberties of the citizens. The constitution was written in a manner to prevent the potential abuse from a concentration of powers in one branch of government and it installed the check and balances of three separate and equal branches. The separation of powers exists in the Constitution of Tennessee for similar reasons.

In our complex society today, it is sometimes difficult to ascertain whether some governmental functions are legislative, executive, or judicial. Also, the establishment of administrative agencies with quasi judicial powers have been found to be lawful. And, perhaps, city and town governments are sufficiently close to their electorate that judicial functions involving solely municipal ordinances and matters to prevent the potential abuses from a concentration of powers.

However, in the application of our state criminal laws, the authors of the Tennessee Constitution forbade a "Corporation Judge" from serving two (or more) masters. The judges takes oath to support the U.S. and Tennessee Constitutions and the laws of the State of Tennessee, and **not** to **please** the body which appointed him. Thus, any provision which allows his dismissal at the pleasure of such appointing body is an impermissible infringement upon the judicial branch and the judge's duty to administer justice without respect to persons.

Actually, Judge Summers served fourteen (14) years at the "pleasure" of the City Commission apparently without reappointment. Certainly, Judge Summers, nor any other "Corporation Judge," can not expect life tenure, and the City Commission—as the electorate—have a right to change a judge without "cause" at some time. It would appear only logical that each new city commis-

sion should have the right to appoint the judge of their choice. Therefore it appears that the absence of a specific term of the City Judge of the city of Soddy Daisy should be construed to provide that the term of the City Judge be concurrent and contemporaneous with the term of the city commission. Apparently, the present term of the Soddy Daisy City Commissioners shall expire in 1987.

Petitioner seeks a determination that any removal of a municipal judge must be in accordance with the provisions pertaining to the Court of the Judiciary, TCA s17-5-101 et seq. Petitioner's dismissal was not for cause and such dismissal is held unlawful herein. Thus, such request is moot. This court would, however, expect that our Supreme Court would hold that its rules are applicable to city judges with state criminal jurisdiction.

In view of the foregoing, the court is of the opinion that all provisions of the law which purport to allow the removal of a City Judge having criminal jurisdiction over the laws of the state at the will of the city commission are unconstitutional due to their violation of the law. Article II, Section 1 and 2 of the Tennessee Constitution. Thus, Judge Summers' dismissal was illegal. It is, therefore,

ORDERED that Jerry H. Summers be reinstated as the City Judge of the city of Soddy Daisy until a new commission is established by the next election. He shall be paid back pay from his termination until his return to office. It is, further

ORDERED that the provisions of Tennessee Code Annotated s6-21-501 pertaining to city judges "who shall serve at the will of the board" and TCA s16-18-102 pertaining to municipal judges who are to "serve at the pleasure of the governing body" be, and the same are, declared to be in violation of the Tennessee Constitution Article II, Section 1 and 2 where the city judge has jurisdiction under Title 40 of the **Tennessee Code Annotated.**

Entered this 6 day of March 1987.

/s/ R. Van Owens
Chancellor, Part I

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

JERRY H. SUMMERS,	)	**FOR PUBLICIATION**
	)	
Petitioner-Appellee,	)	**Filed May 23, 1988**
	)	
	)	
V.	)	**HAMILTON CHANCERY**
	)	
	)	**Hon. R. Vann Owens,**
	)	**Chancellor.**
	)	
MAYOR ROBERT L. THOMSPON, ET AL.,	)	**S/C No. 229**
	)	
	)	
Respondents-Appellants	)	

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OPINION

REVERSED. DROWOTA, J.

This direct appeal raises a significant issue of Tennessee constitutional law, that is, whether certain statutes permitting a municipal judge to be terminated at will are valid. The Petitioner, Jerry H. Summers, sat as city judge for Soddy-Daisy, Hamilton County, Tennessee, for 14 years until he was summarily terminated by the Board of Commissioners of Soddy-Daisy (the Board). Petitioner sought review of his termination by a common law writ of certiorari, contending that at will employment of a judge violated the requirement of separation of powers under Article, II, §1, of the Constitution of Tennessee. The Chancery Court of Hamilton County found that the at will employment provisions of T.C.A. §§6-21-501 and 16-18-102 violated the State Constitution and ordered Petitioner's reinstatement. Respondents, including the Attorney General, have brought this direct appeal to this Court as the sole determinative issue is the constitutionality of these two statutes. T.C.A. §16-4-108.

I.

Given the posture of this case, a common law writ of certiorari, the evidence consists primarily of the re ord made at the meeting of the Board.[1] The record of this meeting is rather meager, although some other evidence in the form of affidavits, exhibits to the Petition for Writ of Certiorari, and Respondents' Answers to Requests for Admission are also included in the record. Respondents did not, however, offer any evidence in their favor at the meeting, relying on the terms of the statute under which they acted. The facts are relatively simple.

Petitioner was appointed to serve as city judge of Soddy-Daisy City Court in 1971 and served continuously in that position for 14 years. The parties have relied upon T.C.A. §6-21-501 (b) (3), which provides that "[t]he board of commissioners shall appoint a city judge who shall be an attorney-at-law entitled to practice in the

[1]Petitioner was terminated at a regularly scheduled public meeting of the Board of Commissioners held on October 3, 1985.

courts of the state and who shall serve at the will of the board."[2] Although several Boards of Commissioners were elected following Petitioner's initial appointment, he was never reappointed or removed by any Board until the meeting of October 3, 1985. Petitioner apparently served without significant conflict with any successive Board; however, according to Petitioner's statement before the Board at the October, 1985, meeting, friction began to develop over the previous summer with the Mayor, Robert L. Thompson, the members of the Board, and the Chief of Police. The exhibits to the Petition, consisting of a series of letters between the Police Chief and Petitioner and between the Mayor and Petitioner, corroborate these allegations made by Petitioner at this meeting, which allegations were reiterated in the Petition itself. Apparently, the Mayor and members of the Board attempted to influence the judicial functions of the city court by attempting to utilize the court to increase city revenue, by requesting that the authority to issue warrants be delegated to city officers or employees who were not magistrates, and by seeking to establish a fixed schedule for appearance bonds, which would be set by clerks. In addition, Mayor Thompson attempted to persuade Petitioner to impose harsher sentences on first offenders in cases involving driving under the influence but Petitioner resisted, contending that judicial discretion was involved in determining the appropriate punishment within the ranges permitted by statute. Evidently, when the Mayor and Board concluded that Petitioner could not be persuaded to conduct city court in the manner in which they wished, they concluded that the at will employment statute could be utilized to terminate Petitioner and replace him with a more malleable city judge.

At a regularly scheduled meeting of the Board on October 3, 1985, without notice to Petitioner or to the citizens of Soddy-Daisy, Petitioner was terminated. No cause for termination was given by the Board of Commissioners. According to the transcript of the

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[2]The parties also considered T.C.A. §16-18-102 (Supp. 1987) as applicable; it was enacted a few years subsequent to Petitioner's initial appointment in 1971. It provides that the ordinance establishing the office of municipal judge, authorized by T.C.A. §16-18-101, "shall provide: ... [t]hat the municipal judge shall be appointed by the governing body of the municipality, to serve at the pleasure of the governing body ..." T.C.A. §16-18-102 (3).

meeting, Mayor Thompson made a motion to change the city judge effective immediately, which motion was carried unanimously. Several citizens protested Petitioner's removal and pressed the members of the Board to give some cause for his removal. The Mayor repeatedly refused to provide any reason for Petitioner's removal, stating that the city attorney had advised the Board not to respond to such questions. When citizens continued to press for some explanation, the city attorney stated that the city charter granted the board the authority to appoint a city judge who served at will and that the Board was not required to have any reason for termination of at will employees. Some citizens persisted in their protests, a few expressing their suspicions that the Board intended to turn the city court into a "cash register court."

Although the formal termination vote had already been taken, the Board invited Petitioner to speak. He stated that politics had been injected into the operation of the court by the Mayor, Board, and Chief of Police. He explained that he had been pressured to increase city revenue and to impose harsher penalties on certain types of offenders. Noting that compliance with the Board's requests would infringe upon his judicial functions, Petitioner warned that the potential for abuse of the city court was high, depriving persons brought before the court a fair and impartial hearing.

On November 27, 1985, Petitioner filed his Petition for Writ of Certiorari in the Hamilton County Chancery Court challenging his termination as arbitrary, capricious, and illegal in that the statutes permitting at will employment of a city judge violated the Constitution of Tennessee. Other claims were asserted by Petitioner as well. Although the Mayor and Board denied many of the allegations of the Petition, by an order of February 9, 1987, the issue was narrowed to the constitutionality of the statutes in question and additional claims asserted by Petitioner against the Board were severed. On March 6, 1987, the Chancellor filed his Memorandum Opinion. Although finding no violation under the language of the statute, as written, the Chancellor observed that city court meets regularly and exercises substantial, local judicial authority and noted the importance of the constitutional issue presented. Finding that judicial independence and impartiality could not be assured if the city judge had no definite term and was subjected to the whims of the local legislative body, he concluded that the at will provisions of T.C.A.

§§6-21-501 (b) and 16-18-102 violated the principle of separation of powers and ordered Petitioner's reinstatement until the next Board of Commissioners election. Notices of Appeal were duly filed by Respondents.

II.

The majority of this Court does not find it necessary to address the constitutional issue presented by this case because the issue may be resolved by a proper construction of the statutes involved.[3] Moreover, the holding of this case is expressly limited to those city courts that are not vested with concurrent jurisdiction with a General Sessions Court, which is an inferior court, under T.C.A. §6-21-501 (b) or T.C.A. §16-18-101 (Supp. 1987). The jurisdiction of these city courts is wholly limited to traffic violations or violations of city ordinances, as the judges of these courts have no authority to impose fines exceeding $50 or to impose extensive terms of imprisonment and, as a practical matter, are essentially administrative judges.[4] Such a judge is not cloaked with the powers of a judge of an inferior court within the meaning of Article VI, §1. **See State ex rel. Haywood v. Superintendent, Davidson County Workhouse,** 195 Tenn. 265, 270-271, 259 S.W.2d 159, 161 (1953).[5] We now turn to the proper construction of the statutes at issue.

T.C.A. §6-21-501 has two separately operative subsections. Subsection (a) grants only a limited jurisdiction to the city courts that are not covered by the terms of subsection (b). Under subsection (a), "[t]he city judge shall have jurisdiction in and over all cases for the violation of and all cases arising under the laws and ordinances of the city." Subsection (b) courts, however, are "vested with concurrent jurisdiction and authority with courts of general sessions of the county... in all cases of the violation of the criminal laws of the

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[3]These statutes are reproduced in an addendum to the opinion.

[4]See, e.g., T.C.A. §§6-19-101 (29); 6-21-502.

[5]These city judges may be appointed to serve indefinite terms at the pleasure of the governing body of the municipality.

State of Tennessee within the limits of such municipalities." T.C.A. §6-21-501 (b) (2). Furthermore, the applicability of subsection (b) is limited by the population classifications of subsection (b) (1). If a city incorporated under the City Manager-Commission Charter does not come within the population ranges of subsection (b), then only subsection (a) can apply and that city court can exercise very limited jurisdiction. A careful examination of the application of this rather complicated statutory scheme is useful.

T.C.A. §6-21-501 (a) was originally enacted in 1921 as part of an act to provide a uniform City Manager-Commission Charter. 1921 Public Acts, chapter 172, article 9, §1. In 1965, this subsection was amended to read as it does in its present form. 1965 Public Acts, chapter 330, §1. Until 1979, subsection (a) was the sole provision of what is now codified at T.C.A. §6-21-501. What is now subsection (b) was amended piecemeal into the statute in 1979, 1981, and 1982. T.C.A. §§6-21-501 (b) (1) (A), (b) (2), and (b) (3) were enacted together in 1979. 1979 Public Acts, chapter 309, §1. Two years later, subsection (b) (1) (B) was added by 1981 Public Acts, chapter 176, §1. The following year, two more amendments were enacted to add subsections (b) (1) (C) and (b) (1) (D). 1982 Public Acts, chapters 888 and 889. The first two subdivisions of (b) (1), that is, (A) and (B), required the governing body of the municipality to adopt the statute within a specified time for it to have become effective. The last two expressly extend the jurisdiction of municipal courts in the cities within the stated population ranges over violations of T.C.A. §55-10-401 (driving under the influence). Subsection (b) must be read as a whole and can be operative only in municipalities properly coming within its classifications.

From our research, apparently when subsection (b) (1) (A) was enacted in 1979, only Williamson County, which then had a population of 34,423 by the 1970 Federal census, came within its terms. Presently Campbell County (34,841) and Dyer County (34,663), by the 1980 Federal census, are within the classification of (b) (1) (A). We have been unable to find any county presently covered by (b) (1) (B) as county populations are reflected in the 1980 Federal census; under the 1970 census, again only Williamson County was within the range specified. For the population ranges of subsections (b) (1) (C) and (b) (1) (D), only Lawrence County (1980 population

of 34,110) falls within these classifications; the cities of St. Joseph (population 897) and Loretto (population 1612) are located in Lawrence County and incorporated under T.C.A. §§6-18-101, **et. seq.** Soddy-Daisy, however, has a population of 8,388 (1980) and is located in Hamilton County, which has a population of 287,740 according to the 1980 Federal census. Clearly, Soddy-Daisy is not within any classification of subsection (b), and Hamilton County, even by the 1970 Federal census,[6] could not have qualified under any provision of subsection (b). If no provision of subsection (b) is applicable, then only subsection (a) is operative.

In addition to T.C.A. §6-21-501 (b), the parties relied on T.C.A. §§16-18-101 and 16-18-102.[7] T.C.A. §16-18-101 is applicable to "any municipality ... having a mayor's court or a municipal court presided over by the mayor ... or the city recorder ... and **having no other provision for a municipal judge for such municipality ...**" (emphasis added). T.C.A. §6-21-501 (a) expressly provides that a city court shall be established under the City Manager-Commission Charter, and "[w]henever the office of city judge is not filled by the appointment of some other person, the recorder shall be the city judge." Otherwise, the city recorder under the City Manager-Commission Charter does not ordinarily exercise judicial functions. T.C.A. §§6-21-401; 6-21-403; 6-22-101. Since T.C.A. §6-21-501 already specifically provides for a city court for municipalities with a City Manager-Commission Charter, sections 16-18-101 and 16-18-102, which are general provisions, are not operative under that charter system.

Although the parties litigated this case on the theory that T.C.A. §§6-21-501 (b), 16-18-101, and 16-18-102 were applicable, we have concluded that these statutes were applicable, we have concluded that these statutes were misapplied by the parties and the trial court. Soddy-Daisy City Court has not been shown on this record to constitute a subsection (b) court under T.C.A. §6-21-501 and

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[6]At that time, Hamilton County's population exceeded 250,000.

[7]See footnote 2, **supra.** These provisions were enacted in 1973 (1973 Public Acts, chapter 330) and were subsequently amended by 1975 Public Acts, chapter 231.

T.C.A. §§16-18-101 and 16-18-102 do not apply[8]; thus, being a subsection (a) court, the city court at issue is not vested with any concurrent jurisdiction with an inferior court within the meaning of Article VI. Without any concurrent jurisdiction, a city judge of a subsection (a) court does not exercise constitutional judicial power. While we think that the apparent motives of the Board were highly questionable as a matter of public policy, we can only conclude that under the terms of these statutes and the provisions of the Constitution, the action of the Board must be upheld; however, this case amply demonstrates the need to secure a definite term of office for subsection (a) judges, but the limited jurisdiction of subsection (a) courts over city ordinances, with their restricted fines and penalties, rather than over any State laws, does not entail an exercise of constitutional judicial power. On these facts, and given our construction of the relevant statutes, at least absent a showing of actual prejudice to a litigant before the city court as a result of the Board's attempt to exercise improper influence over the city judge, we decline to extend the reach of Article VI beyond the exercise of jurisdiction of an inferior court.

III.

Accordingly, because we have concluded that the parties litigated the case on an incorrect reading of the statutes, we hold that the action of the board in removing Petitioner was within their power under T.C.A. §6-21-501 (a), which is the applicable statutory provision in this case. We tax the costs equally among the parties. The judgment below is reversed and the case is dismissed.

/s/ FRANK S. DROWOTA, III Justice.

Concur:

Harbison, C.J.
Fones, Cooper and O'Brien, JJ

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[8]We note that this case would have been better and more adequately tried as a declaratory judgment action.

ADDENDUM OF STATUTES

TENNESSEE CODE ANNOTATED SECTIONS:

6-21-501. Jurisdiction of city judge—Appointment and qualifications.—(a) There shall be a city court presided over by a city judge. The city judge shall have jurisdiction in and over all cases for the violation of and all cases arising under the laws and ordinances of the city. The board of commissioners may appoint a city judge who shall serve at the will of the board. He shall have such qualifications and receive such compensation as the board may provide by ordinance. Whenever the office of city judge is not filled by the appointment of some other person, the recorder shall be the city judge.

(b) (1) (A) The provisions of this subsection shall become effective in any municipality incorporated pursuant to the provisions of chapter 18 of this title, having a population of not less than one thousand six hundred (1,600) nor more than one thousand seven hundred (1,700) according to the federal census of 1970, or any subsequent federal census, which lies within a county having a population of not less than thirty-four thousand (34,000) nor more than thirty-five thousand (35,000) according to the federal census of 1970, or any subsequent federal census, upon approval within fifteen (15) days after May 15, 1979, by two-thirds (2/3) vote of the governing body of such municipality and upon certification of such approval by the presiding officer of the governing body to the secretary of state, notwithstanding the provisions of any other law to the contrary.

(B) The provisions of subsection (b) shall also become effective in any municipality incorporated pursuant to the provisions of chapter 18 of this title, having a population of not less than four thousand fifty (4,050) nor more than four thousand one hundred fifty (4,150) according to the federal census of 1970, or any subsequent census, which lies within a county having a population of not less than thirty-four thousand four hundred (34,400) nor more than thirty-four thousand five hundred (34,500) according to the federal census of 1970, or any subsequent federal census, upon approval within fifteen (15) days after May 15, 1981, by two-thirds (2/3) vote of the governing body of

such municipality and upon certification of such approval by the presiding officer of the governing body to the secretary of state, notwithstanding the provisions of any other law to the contrary.

(C) In municipalities incorporated pursuant to the provisions of chapter 18 of this title, having a population of not less than eight hundred ninety-five (895) nor more than nine hundred (900) according to the 1980 federal census or any subsequent federal census, which are located within a county having a population of not less than thirty-four thousand seventy-five (34,075) nor more than thirty-four thousand one hundred seventy-five (34,175) according to the 1980 federal census or any subsequent federal census, the city judge shall have concurrent jurisdiction with the general sessions judges and circuit court judges to try persons charged with the offense of driving while under the influence of an intoxicant as prohibited by §55-10-401, within the geographic boundaries of such municipalities.

(D) In municipalities incorporated pursuant to the provisions of chapter 18 of this title, having a population of not less than one thousand six hundred (1,600) nor more than one thousand six hundred thirteen (1,613) according to the 1980 federal census or any subsequent federal census, which are located within a county having a population of not less than thirty-four thousand seventy-five (34,075) nor more than thirty-four thousand one hundred seventy-five (34,175) according to the 1980 federal census or any subsequent federal census, the city judge shall have concurrent jurisdiction with the general sessions judges and circuit court judges to try persons charged with the offense of driving while under the influence of an intoxicant as prohibited by §55-10-401, within the geographic boundaries of such municipalities.

(2) There shall be a city court presided over by a city judge. The city judge shall have jurisdiction in and over all cases for the violation of and all cases arising under the laws and ordinances of the city. In addition, the city judge shall be vested with concurrent jurisdiction and authority with courts of general sessions of the county, as set forth in title 40, in all cases of the violation of the criminal laws of the state of Tennessee within the limits of such municipality.

(3) The board of commissioners shall appoint a city judge who shall be an attorney-at-law entitled to practice in the courts of the state and who shall serve at the will of the board. He shall receive such compensation as the board may provide by ordinance. All fees shall be paid into the treasury of the city and are not to be considered a part of the compensation of the city judge. In the absence or disability of the city judge, the mayor may designate a qualified person to serve as city judge. Any vacancy in the office of city judge shall be filled by the board of commissioners.

16-18-101. Governing body may provide for office of municipal judge.—In any municipality in this state having a mayor's court or a municipal court presided over by the mayor of the municipality or the city recorder of the municipality and having no other provision for a municipal judge for such municipality, the governing body of the municipality is authorized by ordinance to provide for the office of municipal judge.

16-18-102. Contents of ordinance.—The ordinance providing for the office of municipal judge shall provide:

(1) That the municipal judge shall be vested with the judicial powers and functions of the mayor or city recorder of such municipality, and shall be subject to the provisions of law and the municipality's charter governing the mayor's court or the municipal court presided over by the mayor or city recorder;

(2) For qualifications of the municipal judge;

(3) That the municipal judge shall be appointed by the governing body of the municipality, to serve at the pleasure of the governing body;

(4) That vacancies in the office shall be filled for the unexpired term by the governing body;

(5) For oath of office and bonding of the municipal judge before he shall enter upon the duties of this office

(6) That the cost of making the bond of the municipal judge shall be paid by the municipality;

(7) That the salary of the municipal judge shall be fixed by the governing body before his appointment, and shall not be altered during his term of service; and

(8) For the designation of a person to serve as judge during the absence or disability of the municipal judge.

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

JERRY H. SUMMERS,	)	
	)	
Petitioner-Appellee,	)	
	)	
V.	)	**HAMILTON CHANCERY**
	)	
	)	**Hon. R. Vann Owens,**
	)	**Chancellor.**
	)	
MAYOR ROBERT L. THOMSPON, ET AL.,	)	**S/C No. 229**
	)	
Respondents-Appellants	)	

CONCURRING OPINION

I do not disagree with either the result of the construction of the statutes in the majority opinion, however, I cannot agree that the result reached by the Court should be announced in a constitutional vacuum and thus write separately to make explicit my views of the constitutional rule implicit in the holding of the majority. While I am of the opinion that the proper construction of these statutes justifies the result reached, that construction of itself is an inadequate explanation of the result without also stating the constitutional basis for the ruling in this case. A fully reasoned resolution of the issues presented is also demanded not only for the foregoing reasons but because the parties litigated the questions and the issues are squarely raised, despite the fact that the statutes were not properly construed below. The significance of the issues, the likelihood that they will be presented again, and their ripeness for resolution make compelling the necessity of an integrated opinion embodying the constitutional principles upon which the proper construction of the statutes in question is obviously based in the majority opinion. Consequently, I express my views of the constitutional issues in this concurring opinion. The facts need not be restated.

I.

The issues in this case involve one of the most fundamental principles of American constitutional government, an independent judiciary. Several components must be clearly understood for the resolution of these questions, not the least of which is the relationship of municipal governments to the State government and how that relationship is affected by the principles of separation of powers. The exercise of the essential powers of government is divided by the Constitution at the local level, despite some constitutional tolerance of endowing local governing bodies or officials with limited judicial capacities. Article II, §2, expressly contemplates such tolerance, but the judicial power itself has defining characteristics and when exercised it must be exercised independently of the other branches, just as each of the other powers must operate. Restraints on government are as necessary, perhaps more necessary, in one's home town as in the State capitol. A concept of home rule is that local government operates most immediately on the daily lives of the people.

A.

The Tennessee Constitution, Article II, §1, expressly states that "[t]he powers of the government shall be divided into three distinct departments: the Legislative, Executive, and Judicial," and by Article II, §2, "[n]o person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permited."[1] **Underwood v. State,** 529 S.W.2d 45 (Tenn. 1975), recognized that "the doctrine of separation of the powers, as set out in Article II, §§1 and 2, of the Constitution of Tennessee, is a fundamental principle of American constitutional government." **Id.,** at 47. Moreover, "'[i]t is essential to the maintenance of republican government that the action of the legislative, judicial, and executive departments should be kept separate and distinct...'" **Richardson v. Young,** 122 Tenn. 471, 492, 125 S.W. 664, 668 (1909). The tension

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[1]Consistent with these provisions, Article II, §26, prohibits a judge from being a member of the General Assembly.

and play among these powers provide restraint and maintain the limits placed on the government in all its departments to protect the rights and liberties of the citizens and to deter abuses of power.[2] **See Bank of the State v. Cooper,** 10 Tenn. 599, 611 (1831) (Opinion of Peck, J.). Each department acts within its own sphere as an independent and co-equal branch of government and can be subject to the will of no other department when performing its particular functions. The primacy of these fundamental principles is undisputed but because the defining powers of each department are not always readily indentified, recognizing an encroachment by one department upon another is sometimes difficult. What is necessary is to find the operating principles at stake in any given case and determine their application to those circumstances based on the evils against which they were intended by the people of the state to provide protection. Those principles decide the cause or controversy presented by the facts.

When the thirteen colonies declared their independence from Britain in 1776, one of the "the causes which impel"[led] them to the separation" was that the King of Great Britain had "made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries." Not only had the recent history of the colonies demonstrated that one of the most immediately oppressive and dangerous instruments of repression was a court subject to arbitrary political whims rather than to the dictates of law, but the history of Europe provided glaring examples of the extent to which judicial power could be abused. The Star Chamber and the Inquisition are sufficient for the point. Before a court whose purpose is to achieve a predetermined, unguided and unrestrained objective, no individual can hope to stand and receive a fair hearing. A court acting in accord with well-defined procedures and pursuant to the authority of a restraining Constitution and the rule of law, independent of the political system for its term of service and its compensation, was considered essential to the success of a constitutional system and to the preservation of fundamental rights. As this Court stated at the time of the adoption of the Constitution of 1834, "[t]he independence of the judiciary ought to

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[2]Cf. Article I, §2, and Article XI, §16.

be anxiously preserved unimpaired; not on account of the individuals who may happen to be judges—they are nothing—but on account of the security of life, liberty, and property of the citizen." **Fisher's Negroes v. Dabbs,** 14 Tenn. 119, 139 (1834).

Article VI, §1, of the Tennessee Constitution states that "[t]he judicial power of this State shall be vested in one Supreme Court and in such Circuit, Chancery and other inferior Courts as the Legislature shall from time to time, ordain and establish; in the Judges thereof, and in Justices of the Peace."[3] In the same section establishing the judicial power, the Constitution permits the Legislature to "vest such jurisdiction in Corporation Courts as may be deemed necessary..." Although the Legislature is given wide discretion concerning the organization of the judicial department, the judicial power residing in the courts is wholly preserved by this provision of Article VI and guaranteed as a separate power by Article II, §1. While the existence of certain generic courts is required and the Legislature has no authority to abolish these, the independent exercise of the judicial power is what the other departments of government have no authority to control. The characteristics defining this power need not be fully stated here but the essential nature of that power is well established under Tennessee law.

While "[i]t is well-settled that the Legislature has the power not only to create inferior courts under the constitutional provision but to diminish or to enlarge or to transfer their jurisdiction in the interest of efficiency and economy," **Duncan v. Rhea County,** 199 Tenn. 375, 385, 287 S.W.2d 26, 30 (1955), "[a] court is an instrumentality of sovereignty, the repository of its judicial power, with authority to adjudge as to the rights of person or property between adversaries. The presence of a judge or judges is necessary as an essential element of a court." **Mengel Box Co. v. Fowlkes,** 135 Tenn. 202, 206, 186 S.W. 91, 92 (1916). Thus, the judicial power entails the exercise of judicial discretion, that is, "[i]n its narrower sense it is the capacity of the individual judge presiding over a par-

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[3]The Constitution recognizes that the judicial power is a combination of judges and courts. **See, e.q., In re Cumberland Power Co.,** 147 Tenn. 504, 508, 249 S.W. 818, 819 (1923); **Jackson, Morris & Co., v. Nimm & Thornhill,** 71 Tenn. 597, 608-610 (1879).

ticular court to perceive and apply to the facts of each case in judgment the law of the land, so that in each case the rights of the parties under the facts of the case may be declared and enforced according to the law of the land." **Scott v. Marley,** 124 Tenn. 388, 395, 137 S.W. 492, 493 (1911). Once a court is established, the judicial power of Article VI, §1, vests in it as "an independent **power,** and, where it has jurisdiction, a sovereign power, just as much as the legislative itself." **Fisher's Negroes v. Dabbs, supra,** at 159 (emphasis in original.).

> "In any court, however, whatever decree the court shall give must be the result of its own judgment, in the performance of the functions assigned it by the constitution. No other department of government has the right to indicate or dictate what that judgment shall be. This would be to usurp the judicial function, confided exclusively by the constitution to the judicial department."

Perkins v. Scales, 2 Shannon's Tenn. Cases 235, 237 (1877). The judgment of a court operates directly upon a person and each person's case must be determined on the facts pursuant to the applicable law. To protect the party brought before a court, the judge must not only be impartial but must be independent of the will or whim of the political departments. As Justice Freeman recognized in his dissenting opinion in **State ex rel. Coleman v. Campbell,** 3 Shannon's Tenn. Cases 355, 376-377 (1875), "a system of courts is an anomaly without judges, would be a mere abstraction with nothing of substance in it—is too thin and shadowy for the practical work of a constitution of government for a state. The system of necessity involves the officers as well as the offices "[of] the judges or else we can have no courts." Continuing, Justice Freeman then emphasized that judicial independence is sacrificed if "the judge will hold his office at the pleasure of a few men... "[who could terminate the office] because the judge had dared, in the discharge of his duty, to refuse to bend his will, or subserve his personal ends, or lend the aid of the judiciary to ... personal aggrandizement." **Id.,** at 390-391. In other words, the performance of the judicial function and the office of the judge merge to sustain that independence necessary to operate as a check and balance on the other branches of government. **See, e.g., In re Cumberland Power Co.,** 147 Tenn.

504, 507-508, 249 S.W.2d 818, 819 (1923). Ultimately, therefore, the evil to be avoided by establishing an independent judiciary is that

> "[i]f the legislature, possessing a large share of executive power, be permitted to exercise judicial power also, or control the action of judges within their peculiar sphere, the liberty of the citizens, under the government of good legislators, would be in imminent peril, and under bad ones would be entirely destroyed."

Fisher's Negroes v. Dabbs, supra, at 138. To assure an independent judiciary, the office of a judge must be secured against the political caprice of other departments of government. **See, e.g., The Judges' Salary Case,** 110 Tenn. 370, 388-389, 75 S.W. 1061, 1065 (1903); **State ex rel Orr v. Leonard,** 86 Tenn. 485, 488-489, 7 S.W. 453, 454-455 (1888). No judges, no courts may be "dependent upon "[another's] pleasure, and subject to be used as instruments, so long as they were obedient, and when they were otherwise, subject to be turned off, and more pliant ones put in place. Were this "[practice] ever sanctioned, we might presently fall on the old evil." **Smith v. Normant,** 13 Tenn. 270, 273 (1833).

B.

Several forms of municipal government are available under the statutes in Tennessee. The charters by which these governments are formed are authorized in these statutes. T.C.A. §§6-1-101, **et seq.,** permits a Mayor-Aldermanic Charter to be adopted and delegates the powers of this form of city government. A City Manager-Commission Charter may be adopted pursuant to T.C.A. §§6-18-101, **et seq.**[4] A Modified City Manager-Council Charter is permitted under T.C.A. §§6-31-101, **et seq.** A metropolitan or consolidated city-county government may be established under T.C.A. §§7-1-101, *et seq.* Each statutory scheme delineates the organization and distribution of municipal powers. Although known as municipal cor-

[4]This is the type of municipal government adopted by Soddy-Daisy, which was incorporated in 1969.

porations, they share little in common with private corporations at this point in history. [5]

The controlling statutes recognize that municipalities have legislative and executive powers and, while judicial functions are sometimes allocated to officers who also serve in other capacities, the basic tripartite distribution of powers is reflected to some extent in each charter system. The larger and more complex the municipal organization, the more distinct these divisions. Although the distinctions among the powers are not as well-defined at the level of municipal government, the exercise of each type of power is nevertheless recognized, even in the simplest form of city government. Thus, under T.C.A. §6-1-406, the mayor is not only the executive officer but is also a member of the city legislative body, the alderman, and by T.C.A. §6-7-403f, the city recorder is given certain judicial functions. T.C.A. §6-2-201 enumerates the corporate powers of the Mayor-Aldermanic Charter, including authority to impose and collect fines for violations of local ordinances and to enact "all bylaws and ordinances necessary and proper to enforce the powers granted, not inconsistent with the Constitution and laws ... of the State of Tennessee." T.C.A. §6-2-201 (16), (19). Under the City Manager-Commission Charter, "[t]he legislative and all other powers except as otherwise provided by this charter are delegated to and vested in the board of commissioners," T.C.A. §6-20-205 (a) (Supp. 1987), but the mayor, who has a seat on the board and may vote, has no veto power under T.C.A. §6-20-213. The general powers of the board include a limited authority "[t]o enforce any ordinance, rule, or regulations, by means of fines, forfeiture, penalties, and imprisonment..." T.C.A. §6-19-101 (29). Under this sys-

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[5]For instance, governmental subdivisional immunity is provided by T.C.A. §§29-20-101, **et seq.**, and the distinction between proprietary and governmental functions has been abolished at least as far as tort claims are concerned. See **Jenkins v. Loudon County**, 736 S.W.2d 603, 608 (Tenn. 1987). But **cf.** T.C.A. §6-1-217. Private corporations obviously do not share this immunity.

tem, a city court is expressly required by T.C.A. §6-21-501.[6] The city judge is authorized to enforce city ordinances, T.C.A. §6-21-502, required to maintain a docket, T.C.A. §6-21-503, and may issue arrest warrants, T.C.A. §6-21-504, as well as set appearance bonds, T.C.A. §6-21-505. Appeal from the city judge's decisions are to the circuit court of the county. T.C.A. §6-21-508. In contrast, under the Modified City Manager-Council Charter, by which all legislative, corporate, and other powers of a city are vested in the city council, T.C.A. §6-31-101, while the city judge under the City Manager-Commission charter serves at the will of the appointing board, T.C.A. §6-21-501 (a), (b) (3), the city judge under the Modified City Manager-Council system is elected by popular vote for a term of four years. T.C.A. §6-33-102 (a), (b). Removal of this city judge is controlled by T.C.A. §6-33-104. The tripartite organization of city government becomes most marked under the Metropolitan system in large part because city and county governments are consolidated. Under T.C.A. §7-3-311 (c), municipal judges are elected for a term of eight years. Thus, despite a sharing of some of the governmental powers or functions among the divisions of municipal government, the general principle of separation of powers is maintained by these statutes.

Moreover, this Court has long recognized "that cities and counties are arms of state government and exist for the convenience of the State for purposes of local government." **City of Knoxville**

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[6]T.C.A. §§16-18-101 and 16-18-102 (Supp. 1987), authorize the governing bodies of certain municipal governments to enact ordinances establishing the "office of municipal judge," T.C.A. §16-18-101 (Supp. 1987), who "shall be vested with the judicial powers and functions of the mayor or city recorder" and who "shall be appointed by the governing body of the municipality, to serve at the pleasure of the governing body..." T.C.A. §16-18-102 (1), (3). This statute expressly recognizes that judicial power is being delegated and permits the transfer of the judicial functions of the mayor or city recorder to a city judge. For instance, T.C.A. §6-2-403 vests concurrent jurisdiction with General Sessions Courts in the "recorder or other proper designated officer ... in all cases of violation of the criminal laws of the state, or of the ordinances of the municipality, within the limits of the municipality," and under T.C.A. §16-18-101, a city court created under this statute would exercise the same jurisdiction as the recorder under T.C.A. §6-2-403.

ex rel. Roach v. Dossett, 672 S.W.2d 193, 196 (Tenn. 1984). **See also State ex rel. Chapdelaine v. Torrence,** 532 S.W.2d 542, 550 (Tenn. 1975); **Hill v. State ex rel. Phillips,** 216 Tenn. 503, 508, 392 S.W.2d 950, 952 (1965); **McConnell v. City of Lebanon,** 203 Tenn. 498, 504, 314 S.W.2d 12, 14 (1958); **Moore v. State,** 159 Tenn. 468, 469, 19 S.W.2d 233, 233 (1929); **Gregory v. City of Memphis,** 157 Tenn. 68, 70, 6 S.W.2d 332, 332 (1928); **Deming v. Nichols,** 135 Tenn. 295, 303, 186 S.W. 113, 115 (1916); **O'Haver v. Montgomery,** 120 Tenn. 448, 463, 111 S.W. 449, 452 (1908); **Ballentine v. Mayor and Aldermen of Pulaski,** 83 Tenn. 633, 643 (1885); **State v. Wilson,** 80 Tenn. 246, 257 (1883); **Mayor and City Council of Nashville v. Fisher,** 1 Shannon's Tenn. Cases 345, 356 (1874); **Trigally v. Mayor and Alderman of Memphis,** 46 Tenn. 382, 390 (1869). They derive their authority and powers from the Legislature and are equally bound by the Constitution of the State. "It is true that the legislature has power to grant special charters to municipal corporations, and may, in general, include within those charters such peculiar provisions, not in conflict with the constitution, as may be needed for the convenience and well being of the particular community." **Malone v. Williams,** 118 Tenn. 390, 425, 103 S.W. 798, 807 (1907). **See also Mayor and City Council of Nashville v. Fisher, supra,** 1 Shannon's Tenn. Cases at 356-357; **Ballentine v. Mayor and Aldermen of Pulaski, supra,** at 643-645. A municipality can no more enact an ordinance contrary to the organic law than the General Assembly. Since the municipality obtains only the power the Legislature may delegate, it can exercise no power that the Legislature is unable to confer. **See State v. Armstrong,** 35 Tenn. 634, 655-656 (1856); **Smith v. Normant, supra,** 13 Tenn. at 272. As stated in **Malone v. Williams, supra,** "all municipal ordinances are by their very nature, and the subordinate character of municipalities as compared with the nation and the State, subject to the limitations prescribed by the constitution and laws of the State and of the United States." 118 Tenn. at 420, 103 S.W. at 806. Nevertheless, "[t]he great diversity of municipal corporations required to meet the wants of local communities seems to demand a larger liberty of legislation than private corporations." **State v. Wilson, supra,** at 259. Thus, at least at the local level, strict adherence to the departmental division of powers is not al-

ways required, as "it has long been recognized that it is impossible to preserve perfectly the theoretical lines of demarcation between the executive, legislative and judicial branches of government." **Underwood v. States, supra,** 529 S.W.2d at 47 (citations omitted). Regardless, Tennessee cases have recognized that the powers of municipalities are constituted by the legislative, executive, and judicial functions of government, **e.g., Lotspeich v. Mayor and Aldermen of Town of Morristown,** 141 Tenn. 113, 119-122, 207 S.W. 719, 721 (1918), and **Johnson v. Brice,** 112 Tenn. 59, 69-70, 83 S.W. 791, 793-794(1903), and no statute or municipal charter could vest all these functions completely in one body. **Malone v. Williams, supra,** 118 Tenn. at 418, 103 S.W. at 805.

C.

The place of municipal or corporation courts within the judiciary is a function of the extent of jurisdiction vested in them by the Legislature. The power of the Legislature to create these courts is manifest under Article VI, §1. Likewise, the Legislature may control the jurisdiction of corporation courts. Obviously, the Legislature has substantial authority over the organization of the judicial department and over the jurisdiction of the courts, and "[a] legislative enactment which does not frustrate or interfere with the adjudicative function of the courts does not constitute an impermissible encroachment upon the judicial branch of government." **Underwood v. State, supra,** at 47. Many cases have recognized "that it is well within the power of the Legislature to specify the reach of the jurisdiction of the corporate courts in exercising their functions." **Doyle v. Metropolitan Government of Nashville and Davidson County,** 225 Tenn. 496, 502, 471 S.W.2d 371, 373(1971). If the Legislature extends the jurisdiction of such a court to include enforcement of any State statutes, constitutional judicial power is vested in them under Article VI because the city

court then exercises a concurrent jurisdiction with an inferior court.[7]

Nevertheless, the power to create such courts is granted, not under the provisions of Article VII, which pertains in part to local government, but under Article VI, which establishes the judicial power of this State. Although cases have held that a corporation court is not a constitutionally mandated court, **e.g., State ex rel. Johnson v. Davis,** 204 Tenn. 510, 513, 322 S.W.2d 214, 215(1959), the necessary implication of its inclusion in Article VI, §1, is that a city court can be given sufficient jurisdiction to constitute an inferior court within the meaning of Article VI. Judicial power is expressly vested in the judges of the courts and the Legislature's authority to vest jurisidction in corporate courts does not give it the authority to control, directly or indirectly, the judge's exercise of judicial power once granted.

> "While it is conceded that jurisdiction is an essential element for the action of a court, yet it is equally a court, whether that jurisdiction be over many or few questions as subjects of judicial action. The extent or narrowness of the jurisdiction exercised does not at all go to the idea of its existence intact, but only its efficiency to perform a large or smaller function as an agency of government."

Jackson, Morris & Co. v. Nimm & Thornhill, 71 Tenn. 597, 608 (1879).[8] Whether the Legislature has vested much or little jurisdiction in an inferior court does not change the nature of the court as a part of the judicial department of the government. Regardless of the Legislature's power to ordain and establish inferior and corporation courts, once created, all Article VI "courts derive their basic

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[7]The jurisdiction of the Soddy-Daisy municipal court is addressed in the majority opinion. The exercise of concurrent jurisdiction in some cases with a General Sessions Court, an inferior court within the meaning of Article VI, involves the exercise of substantial judicial power to determine the appropriate sentence for certain offenders up to 11 months 29 days of incarceration—a substantial deprivation of liberty. The extent of power, not the agency itself, is part of what gives a tribunal its judicial character as a court. The exercise of this power is protected by Article II, §1, and Article VI, §1.

[8]To paraphase Gertrude Stein, a court is a court is a court.

authority from the constitution which, by necessity, grants all powers necessary to engage in the complete performance of the judicial function" within the confines of their jurisdiction. **Anderson County Quarterly Court v. Judges of the 28th Judicial Circuit,** 579 S.W.2d 875, 877 (Tenn. App. 1978). In the sense that a corporation court is not specifically mandated by the Constitution, such courts are not consitituional courts, but when a corporation court is established, it may be vested with judicial power—and that power is itself derived directly from the Constitution and not from any act of the Legislature. **Cf. State ex rel. Boone v. Torrence,** 63 Tenn. App. 224, 241-242, 470 S.W.2d 356, 364. To that extent, at least, "a municpal court is a part of the judicial system of the state..." **Gregory v. City of Memphis,** 157 Tenn. 68, 70, 6S.W.2d 332, 332 (1928). **But see State ex rel. Haywood v. Superintendent, Davidson County Workhouse,** 195 Tenn. 265, 270-271, 259 S.W.2d 159, 161 (1953) (Extent of jurisdiction granted to a corporation court affects its character as part of judicial department). [9]

I cannot concede that because a municipal court may exercise limited judicial powers, it is somehow divested of its essential character as a court. If "[a] municipality is a government within itself, and must have the power to punish for offenses against its laws, and must be able to bring that punishment to bear and to make it effective by its own agencies, that is, through its own courts and officers," **O'Haver v. Montgomery,** 120 Tenn. at 460, 111 S.W. at 451, then the citizens of a municipality may no more be deprived of due process to any greater or lesser extent simply because the limited jurisdiction of the tribunal before which they stand—a **de minimis** violation of constitutional rights would be opening the door to greater deprivations if transitory but nevertheless compelling circumstances caused the exception to swallow the rule. Numerous constitutional provisions would be vitiated by such an exceptional treatment of municipal courts that exercise judicial powers otherwise protected by Article II, §1, and Article VI, §1. **See, e.g.,** Article I, §§2, 8,9,15,16,17. The liberty and property of

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[9]See footnote 7, **supra.** The distinction drawn by this case remains valid and is relied upon in the majority opinion as its **ratio decidendi.**

citizens brought before any court created under Art. VI, §1, are equally protected by the independence of the judiciary, whether the court has broad or narrow jurisdiction. The protection of constitutional rights does not depend on the type of court before which a person may be brought. [10]

At least in the exercise of its concurrent jurisdiction with an inferior court, the relation between a municipal court and a municipality is hardly distinguishable from that between state or county government and the circuit and chancery courts. I recognize that

> "[m]unicipalities enjoy considerable autonomy under the sovereignty of the State. They are instrumentalities of the State government, whose function and duty it is to relieve the latter of the cares entailed in administering the affairs of relatively large aggregations of population within small areas ... enabling "[the general government] to decentralize as much as may be safe and convenient the powers of government..."

O'Haver v. Montgomery, supra. 120 Tenn. at 463, 111 S.W. at 452. **See also Trigally v. Mayor and Aldermen of Memphis, supra,** at 388-390. Regardless, the only powers delegable are derived from those granted to the general government under the Constitution, **e.g., State ex rel. Board of Dental Examiners v. Allen,** 192 Tenn. 396, 398-399, 241 S.W.2d 505, 506 (1951), and while "it is a question for the Legislature to determine what portion of governmental powers shall be conferred upon its municipalities," **Ballentine v. Mayor and Aldermen of Pulaski, supra,** 83 Tenn. at 645, "the ordinances and modes of administration of municipal corporations ... "[may not] be repugnant to any provisions of the Constitution ..." **Trigally v. Mayor and Alderman of Memphis, supra,** at 390. The flexibility of legislation available to the General Assembly concerning the creation, organization, and powers of a municipal government, "'making it a miniature state within its

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[10]The limited jurisdiction over criminal offenses permitted by T.C.A. §6-21-501 (b) is clearly the exercise of judicial power. Many constitutional provisions control the treatment of accused persons and the forum in which criminal liability is determined cannot altar these fundamental rights to due process.

locality,'" **State v. Wilson, supra,** 80 Tenn. at 257, is not unlimited by the restraints of the Constitution. **Id.,** at 254. Articles II, §1, and VI, §1, constrain the Legislature's authority over the delegation and distribution of governmental powers to municipalities.

II.

In the context of the constitutional policy guaranteeing and establishing an independent judiciary, the issue of whether a municipal judge may be terminated at will must be decided. Several cases have been decided that tend to support the Repondents' position on the statutes in question in this case, but none of these cases has presented the issue in the context of an attempt by a local governing body to direct the conduct of a municipal court in the exercise of its judicial functions. In analyzing this issue, not only must the Constitution be construed **in pari materia, e.g. Davis v. Williams,** 158 Tenn. 34,47,12 S.W.2d 532, 535(1928), but whether a judge of a municipal court may be compared to an at will employee of a city, a private corporation or some other business must be determined as well.

A.

At will employment remains viable law in Tennessee at this time and "an employee under a contract of employment at will may be terminated by his employer at any time with or without cause." **Graves v. Anchor Wire Corp. of Tennessee,** 692 S.W.2d 420, 421 (Tenn. App. 1985). "[A] contract for employment for an indefinite term is a contract at will ..." **Whittaker v. Care-More, Inc.,** 621 S.W.2d 395, 396 (Tenn. App. 1981).

A number of subordinate officers of a municipality organized under T.C.A. §§6-18-101, **et seq.,** can "be appointed by the city manager and removed by him at any time." T.C.A. §6-21-102 (c). The city manager is appointed by the board of commissioners but may only be removed at will after a minimum term of twelve months, during which a city manager may be removed only for cause. T.C.A. §6-21-101. Nevertheless, T.C.A. §6-20-220 provides that the mayor, any commissioner, or any employee may be removed by the board of commissioners for cause. Of the officers and employees enumerated in Chapter 21, Title 6, all but the city judge are essentially administrative officials, and, with the excep-

tion of the city manager, none has a definite term of office,[11] but T.C.A. §6-20-220 establishes the procedures for removal for cause and T.C.A. §6-21-106 states that any officer or employee, including the city judge, actively involved in a commission election may be removed for cause. While I think a reading of these provisions **in pari materia** compels the conclusion that at will merely refers to the lack of a definite term of office, I cannot say that such employees of a municipality are at will employees in the same sense as an employee in the private sector. As this Court noted in **Hayden v. Memphis,** 100 Tenn. 582, 588, 47 S.W. 182, 183(1893),

> "[w]hether acting upon express legislative warrant or in the exercise of inherent power ... the "[municipal] corporation must act with some degree of conformity to the rules of the common law. There must first be notice given to the accused of the time when, and the place where, the trial body will meet, in order that he may be present in person, and with his witnesses ... Then there must be a charge or charges against him specifically stated with substantial certainty, yet the technical nicety required in indictments is not necessary.'"

(Citation omitted) Absent these common law prerequisites, which are essentially codified by T.C.A. §6-20-220, no removal can be sustained. **Id.,** 100 Tenn. at 589, 47 S.W. at 183-184. **See also Hawkins v. Kercheval,** 78 Tenn. 535, 543 (1882). While the city manager alone may be removed at will after a definite term of twelve months, as explicitly authorized by statute, the other employees could theoretically retain their employment more or less indefinitely absent cause for removal pursuant to T.C.A. §6-20-220.[12]

Nevertheless, this conclusion does not of itself answer the issue presented by this case because of a city judge, to the extent that

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[11]Elected municipal officials have statutorily set terms of office. T.C.A. §§6-20-101, 6-20-201.

[12]Many people have made careers of public employment at the municipal level and could not be removed at will following each election of a new board of commissioners, Such action by newly elected boards could obviously wholly disrupt city government.

such a judge is the agent of the judicial power vested in a city under Article VI, §1, does not share the characteristics of administrative employees and performs a function whose authority is derived from the Constitution itself. Moreover, no provision of the Constitution authorizes a judicial term for life without periodic election.[13] A city manager, removable at will after a definite term, has a close working relationship with the board of commissioners as the chief administrative officer under T.C.A. §6-21-108 and thus must be sufficiently compatible with the commissioners, but a city judge is a member of the judiciary and does not hold an administrative office or work as closely with the city commission, which is the legislative body of a municipality under T.C.A. §6-20-205. As has been previously discussed in this opinion, the division of powers of the Constitution is maintained to some extent at the municipal level, although the executive and legislative branches are more closely bonded for the sake of efficiency; however, the fundamental principles served by the separation of powers are no less operative. Even if I were to concede that administrative officers and employees are removable at will, that would not resolve the issue in this case, which is not whether this Petitioner should have or should not have been removed, but whether any city judge exercising constitutional judicial power can be removable at will. The significance of the question is clear when the essential nature of the office of a judge is considered:

> "'A judge is a public officer, lawfully appointed to decide litigated questions according to law.' 'He must not only be impartial, but he must pay a blind obedience to the law whether good or bad, he is bound to declare what the law is, and not to make it; he is not an arbitrator but an interpretor of the law ...'"

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[13]Under either view, a city judge may neither be removed at will nor serve for life without the periodic approval of an election. Article VI, §4, is explicit that the term of office for a judge of an inferior court shall be eight years and that such judges shall be elected. "When we are called upon to construe [a] clause in the Constitution ... to ascertain the intention of the framers, we are bound to give such construction as will harmonize with the several provisions which may involve the same question." **Lawyers' Tax Cases,** 55 Tenn. 565, 636 (1875). This is a function of the rule that provisions should be construed **in pari materia.**

Lawyers' Tax Cases, 55 Tenn. 565, 650 (1875) (Opinion of Turney, J.) (citation omitted). Although municipal court is created by statute and its jurisdiction conferred in the Legislature's discretion, "[t]he three branches of government are independent in exercising their assigned duties, whether they be constitutional in nature, statutory or otherwise," **Anderson County Quarterly Court v. Judges of the 28th Judicial Circuit, supra,** at 877, and thus "to the extent that any one branch of the government becomes subservient to another, its ability to act in its role of providing a "check and balance" is curtailed and the effective concept of government ordained by our constitution rapidly loses its viability ..." **Id.,** at 878. Judicial independence is as essential for a city judge who exercises the jurisdiction of an inferior court as it is for a Justice of the Supreme Court.

B.

Elsewhere, this Court has noted that the Constitution does not expressly set the term of office for municipal judges, **e.g., State ex rel. Johnson v. Davis, supra,** 204 Tenn. at 516, 322 S.W.2d at 216, nor does it expressly require that municipal judges be elected, **e.g., City of Elizabethton v. Carter County,** 204 Tenn. 452, 463, 321 S.W.2d 827 (1958), but the Constitution clearly guarantees the independence of the judiciary. Article II, §1; Article VI, §1. **See also Moore v. Love,** 171 Tenn. 682, 686-687, 107 S.W.2d 982, 983 (1937). In **Moore v. Love, supra,** the Court reiterated that "the Constitution by implication excluded any power in the Legislature to remove a judge for reasons other than such reasons as may be personal to the judge's conduct of the office." 171 Tenn. at 687, 107 S.W.2d at 983. The authority of the Legislature over jurisdiction does not translate into a license to remove judges at will. Depending on the jurisdiction conferred, Article VI, §1, recognizes that a municipal court still exercises judicial power over the individuals whose cases are adjudicated in it. **Deming v. Nichols, supra,** 135 Tenn, at 300-304, 186 S.W. at 114-115. **See also O'Haver v. Montgomery, supra,** 120 Tenn. at 460 and 465, 111 S.W. at 451 and 453. The power of removal of a judge from office is not permitted to be arbitrarily invoked because

"'[a]n attempt to remove an officer for any cause not affect-

ing his competency or fitness, would be an excess of power and equivalent to an arbitrary removal. In the absence of any statutory specification, the sufficiency of the cause should be determined with reference to the character of the office and the qualifications necessary to fill it.'"

The Judges' Cases, 102 Tenn. 509, 522, 53 S.W. 134, 137 (1899) (Citation omitted). Furthermore, the cause for removal is to be made public. **Id.,** 102 Tenn. at 527, 53 S.W. at 138.[14] Otherwise,

"if the power of removal conferred by this section is arbitrary and unlimited, a Judge might be removed on account of his religion, his politics, his race, or because he had declared unconstituional a particular enactment ... Such a construction would be monstrous, and wholly abhorrent to fundamental ideas of justice and judicial independence. The design of the framers of the Constitution was to create three departments, executive, legislative, and judicial, which should be co-ordinate and wholly independent in the exercise of their appropriate functions."

Id., 102 Tenn. at 528, 53 S.W. at 138. Considering the role of a judge, as an agent of the State's judicial power, in determing the rights of the parties before the court, the exercise of the power of removal must be constrained to protect judicial independence, which is essential to the effective operation of constitutional government. "The franchise of the state might become dangerous engines in the hands of the crafty, if judges could be moulded to meet exigencies." **Bank of the State v. Cooper, supra,** 10 Tenn. at 614-615.

In **City of Elizabethton v. Carter County, supra,** this Court found that "the terms, if any, of city judges may be fixed in accordance with the wishes of the Legislature," 204 Tenn. at 464, 321 S.W.2d at 828, because "Nowhere in Art. VI, providing for the judicial department of the State, does the Constitution provide or require that the judge of a corporation court shall be elected by the people nor does it make any provision as to the length of the term of office ..." 204 Tenn. at 463-464, 321 S.W.2d at 827. The Court

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[14]If a city court exercises constitutional judicial power, the refusal of a board of commissioners to state a reason for removal would, therefore, be improper.

was not, however, faced with the issue in that case that presents itself now and that so clearly reveals the dangers of subjecting a judge who exercises the jurisdiction of an inferior court to an arbitrary power of removal. I am persuaded that to the extent that **City of Elizabethton v. Carter County** may be considered in-consistent with the implicit constitutional rule of the majority opinion, it should be partially overuled since "[i]t does not follow ... because there may be no restriction in the constitution prohibiting a particular act of the legislature, that such act is therefore constitutional." **Bank of the State v. Cooper, supra,** 10 Tenn. at 603. As Justice Freeman aptly noted in his dissenting opinion in **State ex rel. Coleman v. Campbell, supra,** 3 Shan. Tenn. Cas. at 387:

> "Would not this holding be necessarily based on the idea that one clause of the constitution, or an inference drawn from it, shall be held and construed not only to conflict with another plain and definite provision, but shall overturn it and render it negatory? The power to ordain and establish courts, be held and construed to authorize a removal from office, in a mode different from, and directly in contradiction of the mode pointed out in the unequivocal clauses expressly providing how such acts may and shall be done."

Article VI, §6, and Article V, §§4 and 5, expressly control removal of judges and certain other civil officers, and Article VI, §4, requires that judges of the inferior courts be elected. These provisions must be read **in pari materia.**

C.

I no longer read the language of Article VI, §1, which apparently creates a distinction between municipal courts and other inferior courts, as necessarily excluding municipal courts from the protections and requirements under these other provisions of the Constitution. First, I think that the framers merely intended not to distinguish but to include municipal courts within the judicial power established and preserved by Article VI, §1, and thus, depending on its jurisdiction, a municipal court may constitute an inferior court within the meaning of the Tennessee Constitution as a repository of the judicial power. Second, if the provision of Article VI, §1, is ambiguous as a result of this distinction, "[t]his Court is bound by the

rule constitutional provisions should be given a broad and flexible interpretation where ambiguities exist." **Southern Railway Co. v. Fowler,** 497 S.W.2d 891, 896 (1973) (citation omitted). "The provisions of the constitution are to be given effect according to their intent, as gathered from the entire instrument." **Davis v. Williams, supra,** 158 Tenn. at 47, 12 S.W.2d at 535. Once the Legislature acts to ordain and establish a court under Article VI, §1, "the constitution prescribes the manner of appointing the judges." **Bank of the State v. Cooper, supra,** 10 Tenn. at 616 (Opinion of Kennedy, J.). Moreover, as the Court recognized in **State v. Link,** 172 Tenn. 258, 261, 111 S.W.2d 1024, 1025 (1938), "[t]erms of all judges, including judges of inferior courts, are fixed by the Constitution, Article 6, Section 4, at eight years, and their tenure cannot be impaired except where the Legislature may find it necessary to redistribute the business of the courts for purposes of economy and efficiency." All inferior courts, including municipal courts exercising concurrent jurisdiction with an inferior court, are authorized directly by the Constitution, despite the fact that only three courts are specifically established by mandate:

> "[W]e see no difference whether the power of the circuit and chancery courts is vested in them directly by the constitution, or indirectly through the action of the legislature. In either view, they are constitutional courts, that is, courts ordained and established by constitutional authority. Exactly the same is true as to all other inferior courts ordained and established by the legislature. They are so ordained and established by the authority of the constitution and are therefore constitutional courts."

State ex rel. Coleman v. Campbell, supra, 3 Shan. Tenn. Cas. at 362.

I do not believe that any apt comparison can be made between a judge presiding in any court of Tennessee and an at will employee of a private business. A judge is an officer of this State authorized by the Constitution to exercise the judicial power vested under Articles II, §1, and VI, §1, in the courts of this State. This power is itself independent of the control of the Legislative over the jurisdiction of the courts. The purpose of this independence is no less compelling in the setting of a municipal court than in any other court of

this State. The facts of this case amply demonstrate the danger of subjecting any judge to the political whims of the other departments of government. The precedent controlling at will employment is inapposite. As Justice Peck wisely remarked in his separate opinion in **Bank of the State v. Cooper, supra,**

> "I can never follow precedent, in the line of analogy, when it leads to an infraction of the constitution. Hence the necessity of a frequent recurrence to first principles. If we follow precedent, and move on according to the analogy of cases, we shall be led from step to step until the constitution itself will be lost amidst the subtleties of the law. When precedent is established in the construction of statute or common law, I concede the propriety of following it, unless flatly absurd or unjust. But ... no precedent, however grave, and no adjudication, however respectable, can warrant a violation of that sacred instrument."

10 Tenn. at 662.

In my opinion, when a municipal court is vested with concurrent jurisdiction with an inferior court, the at will provisions of these statutes are unconstitutional and the presumption of constitutionality afforded statutes, **e.g. State ex rel. Maner v. Leech,** 588 S.W.2d 534, 540 (Tenn. 1979), has been rebutted in this case. I am no less aware that precedent would be partially overruled, but "[t]he fact ... that an Act has been construed and enforced and passed upon by this Court is not conclusive of its validity and constitutionality, and this question may be raised at any time when the facts and pleadings justify its consideration." **Gribble v. Wilson,** 101 Tenn. 611, 616-617, 49 S.W. 736, 737 (1899). Furthermore, "any [other] rule ... would lead to entanglements and abuses against which the public should be protected as a matter of public policy." **Driver v. Thompson,** 49 Tenn. App. 646, 652, 358 S.W.2d 477, 479 (1962). As was stated in **Arnold v. Mayor and Aldermen of the City of Knoxville,** 115 Tenn. 195, 202, 90 S.W. 469, 470 (1905):

> "This court recognizes to its fullest extent the necessity for stability, consistency, and a firm adherence to the doctrine of stare decisis in passing upon and construing any provision of the organic law; but if an error has been committed, and be-

comes plain and palpable, the court will not decline to correct it, even though it may have been reasserted and acquiesced in for a long period of years." [15]

A long and unchallenged custom cannot constitutionalize a practice that is eventually shown to be repugnant to the fundamental law. Finally, I am also cognizant that many municipalities could be affected by such a holding, but as Jusitice Freeman noted in his separate opinion in **Lynn v. Polk, supra,** 76 Tenn. at 144, "[c]onsideration of consequences is not for us—only duty is to be known, and faithfully done." If the Constitution is to remain viable and its integrity maintained, this Court has no alternative but to enforce it regardless of any lesser policy considerations because "the intent and meaning of the Constitution, when arrived at in accordance with the established principles of construction, is the Supreme law of the land..." **Pope v. Phifer,** 50 Tenn. 682, 686 (1870), **overruled on other grounds** 126 Tenn. 106, 148 S.W. 229 (1912). "No argument from policy, or inconvenience, or the harmony of the system can be permitted to have any weight in the decision of "[a constitutional] question." **Sheppard v. Johnson,** 21 Tenn. 231, 296 (1841). **See also State ex rel. Coleman v. Campbell, supra,** at 387 (Freeman, J., dissenting).

III.

While the majority opinion declines to make explicit the constitutional rule clearly implied by the holding in this case, I have fully addressed the constitutional issues and would hold that, when a corporation court is vested with any concurrent jurisdiction with an inferior court, the at will tenure provisions of T.C.A. §§6-21-501(b) and 16-18-102 (3), as presently drafted, are unconstitutional encroachments upon the independence of the judiciary in violation of Article II, §1, and Article VI, §1, of the Tennessee Constitution. Nevertheless, I concur with the majority that a municipal judge appointed under T.C.A. §6-21-501 (a), who is not vested with any

---

[15]"If the law was manifestly misunderstood or misapplied in the case decided, its primacy as a precedent may be overthrown." **The Judges' Cases, supra,** 102 Tenn. at 542, 53 S.W. at 142.

constitutional judicial power within the meaning of Article VI because that court does not exercise concurrent jurisdiction with an inferior court, may be terminated at will. Accordingly, I would hold that city judges properly exercising any concurrent jurisdiction with an inferior court must be elected for a term of eight (8) years as required by Article VI, §4, and May not be removed except pursuant to the Constitution of Tennessee.

I am authorized to state that Justice O'Brien concurs in this concurring opinion.

/s/ FRANK F. DROWOTA, III, Justice.

SUPREME COURT OF TENNESSEE AT KNOXVILLE
SEPTEMBER TERM 1987

Filed May 23, 1988
Robert W. Summar, Clerk

DECREE

JERRY H. SUMMERS,
Petitioner-Appellee

Hamilton Equity
(No. 63664)

Vs.

REVERSED AND DISMISSED

MAYOR ROBERT L. THOMPSON, ET AL.,
Respondents-Appellants

This cause coming on to be heard upon a transcript of the record from the Chancery Court of Hamilton County, briefs of the parties, and argument of counsel, upon consideration whereof the Court is of the opinion that in the judgment of the court below there is error.

It is therefore ordered and adjudged by the Court that the judgment of the Chancery Court of Hamilton County is reversed and the case is dismissed. A copy of this Court's Opinion shall accompany the mandate on the remand to the trial court.

Costs are taxed equally between the Petitioner-Appellee, Jerry H. Summers, and the Respondents-Appellants, Mayor Robert L. Thompson, et al, and execution may issue from this Court for the costs incident to the appeal. This cause is remanded to the trial court aforesaid for collection of the costs adjudged in that court.

Frank F. Drowota, III, J.
William J. Harbison, C.J.
Wm. H.D. Fones, J.
Robert E. Cooper, J.
Charles H. O'Brien, J.

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

JERRY H. SUMMERS,	)	**Filed July 18, 1988.**
	)	
Petitioner-Appellee	)	
	)	
V	)	**HAMILTON CHANCERY**
	)	**S/C No. 229**
MAYOR ROBERT L. THOMPSOPN, ET. AL.,	)	
	)	
Respondents-Appellants.	)	

ORDER

A petition for rehearing has been filed on behalf of Petitioner-Appellee, Jerry H. Summers. After consideration of the same, the Court is of the opinion that the petition should be and the same hereby is overruled at the cost of Appellant.

/s/ FRANK F. DROWOTA, III, Justice

Concur:

Harbison, C.J.
Fones, Cooper and O'Brien, JJ.

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

JERRY H. SUMMERS,	)	**S/C No. 229**
	)	
Petitioner-Appellee	)	**CHANCERY COURT**
	)	**NO. 63664**
	)	
vs.	)	**HON. R. VANN OWENS**
	)	**CHANCELLOR**
	)	
MAYOR ROBERT L. THOMPSOPN, et al	)	
	)	
Respondent-Appellee	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Jerry H. Summers, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the Final Decree of the Supreme Court of Tennessee reversing the opinion of the Chancery Court of Hamilton County, Tennessee and dismissing Appellant's action, which was entered in this proceeding on May 23, 1988.

This appeal is taken pursuant to Title 28, U.S.C., § 1257, Sub-paragraph 2.

This the 17th day of August, 1988.

Respectfully submitted,
SUMMERS, McMREA & WYATT, P.C.

By: /s/ Jerry H. Summers
By: /s/ Thomas J. Wright

Attorneys for Appellant
500 Lindsay Street
Chattanooga, TN 37402
615/265-2385

AFFIDAVIT OF SERVICE

STATE OF TENNESSEE)
COUNTY OF HAMILTON)

I, Thomas J. Wright, depose and say that I am an attorney in the office of Summers, McCrea & Wyatt, P.C., counsel of record for Jerry H. Summers, the Appellant herein, and that on August 17, 1988, pursuant to Rule 28, Rules of the Supreme Court, I served a copy of the foregoing Notice of Appel on each of the parties required to be served by placing same in the United States Mail, postage prepaid to:

Ms. Jackie Schulten
415 Georgia Avenue
Chattanooga, TN 37402

Mr. Michael J. Cody
Tennessee Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219

/s/ Thomas J. Wright

Subscribed and sworn to
before me this the 17 day
of August, 1988.

/s/ Kathleen H. Slaiten
Notary Public

My Commission Expires:
4-22-92

NOT1/2/dg
8/17/88

Supreme Court, U.S.
FILED
NOV 12 1988
JOSEPH E. SPANIOL, JR.
CLERK

No. 88-665

In The

Supreme Court of the United States

October Term, 1988

JERRY H. SUMMERS,

Appellant,

vs.

ROBERT L. THOMPSON, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE

MOTION OF APPELLEE, CHARLES W. BURSON, ATTORNEY GENERAL AND REPORTER OF THE STATE OF TENNESSE, TO DISMISS OR AFFIRM

CHARLES W. BURSON
Attorney General & Reporter
State of Tennessee
[Counsel of Record]

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QUESTIONS PRESENTED

1. Whether Tenn. Code Ann. §§ 6-21-501 and 16-18-102 which provide for at-will termination of a municipal judge, who has jurisdiction to impose fines up to $50.00 and incarcerate for terms of up to 90 days, by the governing body of that municipality violates the doctrine of separation of powers contained in Article III, § 1 of the United States Constitution?

2. Whether the doctrine of separation of powers contained in Article III, § 1 of the United States Constitution is applicable to the states through the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the United States Constitution?

PARTIES TO THE PROCEEDINGS BELOW

The appellant in this action is Jerry H. Summers. The appellees in this action are: Mayor Robert L. Thompson, Commissioners James Ables, Don Gentry, Bryson Johnson, and Jimmy Williamson, in their capacities as Commissioners of the City of Soddy-Daisy, Tennessee, Robert Eckard, in his capacity as Police Chief of Soddy-Daisy, Tennessee, the City of Soddy-Daisy, Tennessee, and Charles W. Burson, Attorney General and Reporter for the States of Tennessee.[1]

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[1] Pursuant to Rule 40.3 of the Supreme Court Rules, Charles W. Burson has been substituted for W. J. Michael Cody as the Attorney General and Reporter for the State of Tennessee as a result of Mr. Cody's resignation and Mr. Burson's appointment effective October 1, 1988.

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No. 88-665

In The

Supreme Court of the United States

October Term, 1988

JERRY H. SUMMERS,

Appellant,

vs.

ROBERT L. THOMPSON, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE

MOTION OF APPELLEE, CHARLES W. BURSON, ATTORNEY GENERAL AND REPORTER OF THE STATE OF TENNESSE, TO DISMISS OR AFFIRM

Pursuant to Rule 16.1, the appellee, Charles W. Burson, Attorney General and Reporter for the State of Tennessee (appellee) moves to dismiss or affirm the appeal filed on behalf of Jerry H. Summers (appellant). This motion is based upon the fact that the decision of the Supreme Court of Tennessee rests upon independent and adequate state grounds and that the questions on which the decision of this case depends are so unsubstantial as to not need further argument.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved in this appeal are Article III, § 1 of the United States Constitution, the Fifth and Fourteenth Amendments of the United States Constitution. The statutory provisions involved are Tenn. Code Ann. §§ 6-21-501, 6-18-101, and 6-18-102. The constitutional provisions are set out in appellant's Jurisdictional Statement at page 2; whereas, the statutory provisions involved are set out in appellant's Jurisdictional Statement at pages A-65 through A-67.

———o———

ARGUMENT

I. THE DECISION OF THE SUPREME COURT OF TENNESSEE RESTS ON NON-CONSTITUTIONAL GROUNDS; THEREFORE, THIS COURT SHOULD DISMISS THIS APPEAL.

From the inception of this litigation, the appellant has contended that Tenn. Code Ann. § 6-21-501, which provides that the municipal judge of Soddy-Daisy is to "serve at the will of the board of commissioners", is violative of the doctrine of separation of powers under Article III, §1 of the United States Constitution and Article II, §§1 and 2 of the Tennessee Constitution and the due process provisions of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, § 8 of the Tennessee Constitution. *See* Appellant's Jurisdictional Statement, page A-23, ¶ 24. However, the Tennessee Supreme Court expressly limited its decision to one of statutory

construction and did not address either the state or federal constitutional issues raised by the appellant. In particular, the Tennessee court stated the following:

> The majority of this Court does not find it necessary to address the constitutional issue presented by this case because the issue may be resolved by a proper construction of the statutes involved. Moreover, the holding of this case is expressly limited to those city courts that are not vested with concurrent jurisdiction with a general sessions court which is an inferior court, under T.C.A. § 6-21-501(b) or T.C.A. § 16-18-101 (Supp. 1987). The jurisdiction of these city courts is wholly limited to traffic violations or violations of city ordinances, as the judges of these courts have no authority to impose fines exceeding $50.00 or to impose extensive terms of imprisonment and, as a practical matter are essentially administrative judges. Such a judge is not cloaked with the powers of a judge of an inferior court within the meaning of Article VI, § 1. See *State ex rel. Haywood v. Superintendent, Davidson County Workhouse*, 195 Tenn. 265, 270-71, 259 S.W.2d 159, 161 (1953).

Appellant's Jurisdictional Statement, page A-61.

This Court has indicated in the past that it has no jurisdiction to entertain an appeal where the decision of a state court is based upon independent and adequate state grounds. *See Michigan v. Long*, 463 U.S. 1032 (1983); *Ridgeway v. Ridgeway*, 454 U.S. 46, 54 (1981). The appellant argued before the courts, below, that the municipal court of Soddy-Daisy, Tennessee was vested with concurrent jurisdiction of a general sessions court in Tennessee, which is an inferior court under Article VI of the Tennessee Constitution. Based upon that argument, the appellant concluded that at-will termination of the municipal

judge by the board of commissioners would be violative of the doctrine of separation of powers under both the Tennessee and United States Constitutions since the municipal court is part of the judicial branch of government in Tennessee.

However, the Supreme Court of Tennessee in its decision held that the municipal court of Soddy-Daisy, Tennessee is not vested with concurrent jurisdiction with a general sessions court in Tennessee under Tenn. Code Ann. §§-6-21-501(b), 16-18-101. This holding pretermits the appellant's federal constitutional argument since the Supreme Court of Tennessee concluded that judges of courts who cannot impose fines to exceed $50.00 are as a practical matter administrative judges and are not cloaked with the powers of a judge of an inferior court within the meaning of Article VI, §1 of the Tennessee Constitution. Such a determination provides an independent and adequate state ground upon which the decision of the Supreme Court of Tennessee rests; therefore, this Court should dismiss this appeal.[2]

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[2] As Justice Brennan has indicated, judgments based upon an independent and adequate state ground "not only cannot be overturned by, (but) indeed are not even reviewable by the Supreme Court of the United States." Justice Brennan, *State Constitutions and the Protection of Individual Rights,* 90 Harv. Law Rev. 489, 501 (1977).

II. THE APPLICABILITY OF THE DOCTRINE OF SEPARATION OF POWERS UNDER ARTICLE III, SECTION I OF THE UNITED STATES CONSTITUTION TO THE MUNICIPAL COURT OF SODDY-DAISY, TENNESSEE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION OVER WHICH THIS COURT SHOULD EXERCISE ITS JURISDICTION.

This Court in the case of *Dreyer v. Illinois,* 187 U.S. 71 (1902), stated the following with regard to the applicability of the doctrine of separation of powers under Article III, § 1 of the United States Constitution to State Courts:

> It is only necessary now to say that, even if the statute in question were obnoxious to the objection now urged by plaintiff in error, it would not follow that this Court would review a judgment of the highest Court of the State, which expressly or it by necessary implication sustained it as constitutional. A local statute investing a collection of persons not of the judicial department, with the powers that are judicial, and authorizing them to exercise the pardoning power which alone belongs to the Governor of the State, presents no question under the Constitution of the United States. The right to the due process of law prescribed by the Fourteenth Amendment would not be infringed by a local statute of that character. Whether the legislative, executive or judicial powers of a State shall be kept all together distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers, which strictly speaking, pertain to another department of government, is for the determination of the State.

Id. at 83-84.

Subsequent to the *Dreyer* decision, this Court has again and again held that the Fourteenth Amendment leaves the States free to distribute the powers of government as they will between their legislative and judicial branches. See *Hughes v. Superior Court of California in and for the County of Contra Costa,* 339 U.S. 460 (1950); *Prentiss v. Atlantic Coastline Co.,* 211 U.S. 210 (1908); *Rose v. Hodges,* 423 U.S. 19 (1979); *Sweazy v. State of New Hampshire,* 354 U.S. 234 (1957); *Mayor of the City of Philadelphia v. Educational Equity League,* 415 U.S. 605 (1974); *Minnesota v. Cloverleaf Creamery Co.,* 449 U.S. 456 (1981). Thus, it is a well-established principle by this Court that the doctrine of separation of powers under the United States Constitution is not applicable to the states through the Fourteenth Amendment.

The appellant's only argument for this Court to grant jurisdiction in this case is that the *Dreyer* decision should be overruled because since the time of the *Dreyer* decision in 1902, "a number of fundamental constitutional rights have been applied to the States through the Fifth and Fourteenth Amendments. . . . [and that] it is essential that the rights of the individual be protected by the application of federal separation of powers doctrine to the States as well." Appellant's Jurisdictional Statement, pages 4-5. Beyond failing to provide any reasons why this issue may be one of significant national importance justifying this Court's exercise of its jurisdiction, the appellant's analysis is fatally flawed.

This Court has on a number of occasions applied individual rights secured under the First Amendment to the States through the Fourteenth Amendment. *See, e.g.,*

Cantwell v. Connecticut, 310 U.S. 296 at 303 (1940). However, the appellant in this case seeks to apply Article III, § 1 of the United States Constitution, which concerns the structure of the federal government not individual liberties, to the States. Such a proposition is wholly absurd. The doctrine of separation of powers has nothing to do with individual liberties secured under the First Amendment; rather, it concerns the structure and distribution of power among the three branches of the federal government. As this Court has indicated, States are free to structure their own governments in whatever manner they deem fit.

The purpose of applying the First Amendment to the States through the Fourteenth Amendment is to ensure that the fundamental rights of all citizens are protected. On the other hand, how a state distributes its powers between its branches of government is a decision left to the State not the federal government. To provide otherwise would constitute an unwarranted intrusion by the federal government into the structure of state governments and effectively emasculate the well-established constitutional doctrine of federalism.

———o———

CONCLUSION

Based upon the foregoing authorities and analyses, the appellee respectfully requests this Court to dismiss or affirm the appeal in this case.

Respectfully submitted,

CHARLES W. BURSON
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